Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1102

JOHN D. ASHCROFT, Attorney General of the State of Missouri,

and

GEORGE A. PEACH, Circuit Attorney of the City of St. Louis, Missouri,

Appellants,

vs.

MICHAEL FREIMAN, M.D.,

and

ALLEN S. PALMER, D.O.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

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In the Supreme Court of the United States

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JOHN D. ASHCROFT, Attorney General of the State of Missouri,

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Appellants,

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MICHAEL FREIMAN, M.D.,

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ALLEN S. PALMER, D.O.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

The Attorney General for the State of Missouri and the Circuit Attorney for the City of St. Louis, the appellants, appeal from that portion of the final judgment of the United States Court of Appeals for the Eighth Circuit, dated September 13, 1978, holding that §188.045, RSMo Supp. 1975, is an unconstitutional violation of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States. Although the name of J. Brendan Ryan appeared during the

course of these proceedings before the lower courts, because Mr. Ashcroft and Mr. Ryan were sued in their official capacities only, the name of Mr. George A. Peach has been substituted as the present Circuit Attorney for the City of St. Louis, Missouri.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, which appears in the appendix hereto, p. 1-A, *infra*, is reported at 584 F.2d 247 (8th Cir. 1978).

Doctors Freiman and Palmer, appellees in this Court, appealed to the Eighth Circuit from two separate orders, both supported by memoranda, of the United States District Court for the Eastern District of Missouri. The memorandum of the United States District Court for the Eastern District of Missouri denying the motion for summary judgment of appellees Freiman and Palmer, which appears in the appendix hereto, p. 11-A, *infra*, is reported at 440 F.Supp. 1193 (E.D.Mo. 1977). The memorandum of the United States District Court for the Eastern District of Missouri granting the motion for summary judgment of appellant Ashcroft, which appears in the appendix hereto, p. 18-A, *infra*, is reported at 443 F.Supp. 1390 (E.D.Mo. 1978).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit, holding, in part, that a Missouri state statute, specifically §188.045, RSMo Supp. 1975, is unconstitutional, was filed on September 13, 1978. See p. 1-A, *infra*. A motion for rehearing, filed by Doctors Freiman and Palmer, was entertained by the Eighth Circuit and the order respecting the motion for rehearing was filed on October 10, 1978. See p. 20-A, *infra*.

A notice of appeal to this Court was duly filed in the United States Court of Appeals for the Eighth Circuit on December 14, 1978. See p. 22-A, *infra*.

This appeal is being docketed in this Court within 90 days from the date of the order respecting the motion for rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2).

QUESTION PRESENTED

Whether §188.045, RSMo Supp. 1975 is violative of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States as representing an impermissible state requirement that physicians inform their patients of the provisions of §188.040, RSMo Supp. 1975, to the effect that one consequence of the decision to abort, should a live birth result, could be the termination of parental rights, there being a legitimate state interest in protecting prospective mothers by requiring an informed consent to the abortion decision?

CONSTITUTIONAL PROVISIONS AND STATE STATUTES

Fourteenth Amendment, Section 1, United States Constitution:

> "[Nor] shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 188.045, RSMo Supp. 1975, found unconstitutional by the United States Court of Appeals for the Eighth Circuit:

> "Any woman seeking an abortion in the state of Missouri shall be verbally informed of the provisions of section 188.040 by the attending physician and the woman shall certify in writing that she has been so informed."

Section 188.040, RSMo Supp. 1975, referred to in §188.045 and which all lower courts agree cannot be made the subject of constitutional attack by these appellees because of their lack of standing:

> "In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant to section 211.411 [sic], RSMo. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant."[1]

STATEMENT OF THE CASE

The General Assembly of the State of Missouri enacted into law Chapter 188, RSMo Supp. 1975, entitled Regulation of Abortions, effective June 14, 1974. Included in the statutory enactment were §§188.040 and 188.045.

1. All lower courts and the parties herein are in agreement that the statutory reference to §211.411 should read as §211.441.

Dr. Michael Freiman, one appellee in the present case, together with Planned Parenthood of Central Missouri and one other physician, initiated a constitutional challenge before a three-judge panel of the United States District Court for the Eastern District of Missouri asking injunctive relief against enforcement of most of the legislation enacted to regulate abortions. As in the present case, the Attorney General of the State of Missouri and the Circuit Attorney for the City of St. Louis, were the named defendants in that lawsuit. Specifically attacked in that lawsuit was what is now §188.040. That statutory section applies "where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother." In such case, the child is to be considered "an abandoned ward of the state" and the mother and consenting father lose their "parental rights and obligations" relating to such infant as provided for in a specific section of the Missouri Juvenile Code. That litigation initiated by Dr. Freiman and others culminated in the opinion by this Court in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976). This Court held that the physicians in *Planned Parenthood* lacked standing to challenge the termination of parental rights provisions of §188.040.

> "The physician-appellants do not contend that this section of the Act imposes any obligation on them or that its operation otherwise injures them in fact. They do not claim any interest in the question of who receives custody that is 'sufficiently concrete' to satisfy the 'case or controversy' requirement of a federal court's Art III jurisdiction. Singleton v. Wulff, post, at 112, 49 L Ed 2d 826, 96 S Ct 2868. Accordingly, the physician-appellants do not have standing to challenge § 7 [188.040] of the Act."[2]

2. 428 U.S. 52, 63 n.2, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976).

On July 8, 1976, the appellees filed this lawsuit seeking a declaratory judgment that §§188.040 and 188.045, RSMo Supp. 1975, were unconstitutional and asking injunctive relief against their enforcement. The Attorney General for the State of Missouri, as a named defendant, filed his answer on July 29, 1976.

The answer filed by the appellant Attorney General affirmatively contended that the appellee-physicians were barred from challenging the constitutionality of §188.040 because their contentions had already been decided in an adverse manner by the Supreme Court in the *Planned Parenthood* case, and asked the District Court to dismiss the challenge to §188.040 because the physicians bringing suit did not have the requisite standing to challenge the provisions of that statute.

On July 6, 1976, the Attorney General filed separate sets of interrogatories directed toward each of the two physicians who had filed the lawsuit. Joint answers to the separate sets of interrogatories were filed on October 13, 1976. The answer to one of the interrogatories indicated that the appellees had jointly advised some 40 to 60 patients of the provisions of §188.040 by reading that section verbatim to them, but that none of the patients so informed had changed their minds and decided not to obtain abortions.

The appellees filed their motion for summary judgment, in the District Court, attaching affidavits, on October 27, 1976. A memorandum in support of that motion was filed on November 12, 1976. The appellant Attorney General filed suggestions in opposition to the motion for summary judgment, together with the supporting affidavit of Dr. Thomas H. Hilgers, on or about February 19, 1977.

In their affidavits filed in support of their motion for summary judgment below, each physician-appellee stated

that he was actively engaged in the medical practice of obstetrics and gynecology offering and providing pregnancy termination procedures within the first twelve weeks of gestation. Each physician alleged that the possibility of a live birth resulting from an abortion performed within their medical practice was totally nonexistent and that the duty imposed by the challenged legislation was highly adverse to the best health interests of his patients. Each attested that the challenged statutory sections increased the anxiety of their patients during abortion procedures thereby raising the risks of mortality and morbidity. Each further attested that the encumbrance represented by the challenged statutory sections might result in the making of incorrect decisions by persons considering abortions. The physicians separately stated their beliefs that the requirement of §188.045 caused them to provide information to their patients which was adverse to the customary practices of medicine and not in the best interests of their patients.

In the affidavits submitted in support of the suggestions opposing the grant of summary judgment to the appellees, Dr. Hilgers attested that he was an Assistant Professor in the Department of Gynecology and Obstetrics of the St. Louis University School of Medicine. Dr. Hilgers stated that he had treated or counseled patients, during his medical practice, prior to or following abortions. He stated that the patients whom he counseled expressed interest and concern primarily in the complications which might result from an abortion. Dr. Hilgers attested to his belief that all patients should be advised in advance of potential complications arising from any medical procedure and that all patients should give an informed consent before undergoing a surgical procedure. The doctor stated his opinion that a patient's consent to an abortion cannot be informed unless the patient is fully advised of all possible ramifications. Dr. Hilgers attested that it was in the best interests

of the patient, and consistent with the highest standards of medical practice, to provide sufficient information on which the relative benefits and risks of any medical procedure could be weighed. Dr. Hilgers stated his belief that it would not be possible to generalize how patients would react when informed by physicians as required by §188.045. Dr. Hilgers concluded his affidavit by attesting that infants can and have been born alive after an attempted abortion and that, although not likely in the present state of medical technology, advances in medical technology may be developed which would enable fetuses to survive abortions attempted in the first twelve weeks of gestation.

The three-judge District Court composed of the Honorable William H. Webster, United States Circuit Judge, the Honorable H. Kenneth Wangelin, United States District Judge and the Honorable John F. Nangle, United States District Judge, entered its order, on November 28, 1977, holding that the physician-appellees lacked standing to challenge §188.040 and denying the motion for summary judgment. The order was supported by the memorandum of Judges Wangelin and Nangle and the concurring memorandum of Judge Webster. The order and memoranda are included herein at pages 10-A and 11-A, *infra*. The three-judge District Court disposed of the appellees' motion for summary judgment as follows:

> "Before the Court determines whether a plaintiff may assert the rights of third parties, the plaintiff's standing to challenge the legislation must be established. Plaintiffs have not established their standing to challenge § 188.040. *Planned Parenthood, supra.*
>
> With only § 188.045 remaining, it is clear that plaintiff's motion for summary judgment must be denied. In *Planned Parenthood, supra,* the Court held that a state may permissibly require a woman's prior written consent, noting that 'it is desirable and imperative that it [the decision to abort] be made with full knowledge of its nature and consequences.' *Id.* at 67, 96 S.Ct. at 2840. . . ." *Frieman* v. *Ashcroft,* 440 F.Supp. 1193 at 1195 (E.D.Mo. 1977).

Although Judge Webster, in his concurring opinion, clearly indicated his belief that §188.040 was unconstitutional, he agreed that the question of standing was an "insurmountable" obstacle to the appellees' attack on the parental rights termination provision of the Missouri law.

By memorandum dated November 29, 1977, the appellees amended their complaint in the District Court by striking all reference to injunctive relief. There no longer being a prayer for injunctive relief against the enforcement of the challenged state statutes, this matter then proceeded before a single judge in the District Court. The defendant Attorney General filed his motion for summary judgment on February 13, 1978. On February 17, 1978, the Honorable John F. Nangle of the United States District Court for the Eastern District of Missouri entered his order, supported by memorandum, granting defendants' motion for summary judgment. The order and memorandum appears in the appendix hereto at pages 17-A and 18-A, *infra*. The reasoning of Judge Nangle was that:

> "In *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), the Court held that a state may permissibly require written consent, as 'it is desirable and imperative that it [the decision to abort] be made with full knowledge of its nature and consequences.' *Id.* at 67, 96 S.Ct. at 2840. Certainly, the termination of parental rights, should a live birth result, is a consequence of the decision to abort. Absent a party with standing to challenge § 188.040, termination of parental rights

> does remain a consequence of the decision to abort and the state may permissibly require a physician to so inform the patient. When viewed in this context the statute is clearly permissible. *Cf. Whalen* v. *Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). . . ." *Frieman* v. *Ashcroft*, 443 F.Supp. 1390, 1391 (E.D.Mo. 1978).

In due time, the physician-appellees filed their notice of appeal to the United States Court of Appeals for the Eighth Circuit from both orders of the District Court disposing of the parties' respective motions for summary judgment. The appeal was perfected, orally argued, and decision was rendered thereon by the Eighth Circuit on September 13, 1978.

Circuit Judges Stephenson and Henley and Senior Circuit Judge Ingraham affirmed that portion of the District Court's orders finding that physicians are without standing to challenge the constitutionality of §188.040, but reversed the District Court with respect to the constitutionality of §188.045.

In affirming the District Court on the matter of standing, the Eighth Circuit relied upon the language of *Planned Parenthood of Central Missouri* v. *Danforth*, previously quoted, and upon the language in one of that Court's opinions in a similar case. *Hodgson* v. *Lawson*, 542 F.2d 1350, 1355 n.2 (8th Cir. 1976). Although unable to reach the merits of §188.040 because these appellees lack standing to have challenged that statute, the Eighth Circuit made it clear, in dicta, that they believed the termination of parental rights provision of §188.040 to be unconstitutional. In striking down §188.045, the Court of Appeals held that the legitimate state interest of protecting mothers by requiring informed consents to abortion decisions was not reasonably related to the requirement that a physician tell

his patients of the parental rights provision of §188.040 and that the statute was, therefore, a violation of the equal protection and due process clauses of the Fourteenth Amendment.

On or about September 15, 1978, Doctors Freiman and Palmer petitioned the Court of Appeals for a rehearing asking that Court to consider an award of reasonable attorneys' fees. In an order filed on October 10, 1978, the court below disposed of the petition for rehearing by awarding a sum in attorneys' fees incurred during the appeal.

The appellant filed his notice of appeal to the United States Supreme Court, with the Clerk of the United States Court of Appeals for the Eighth Circuit, on December 14, 1978.

THE QUESTION IS SUBSTANTIAL

The question as to whether the Fourteenth Amendment prohibits a state from requiring physicians to inform their abortion-seeking patients of the existence of a state statute which would terminate their parental rights should a live birth occur is a novel and substantial one. The question has never before been addressed by this Court. That the question is difficult to resolve is made clear by the fact that of the six federal judges having dealt with this case in the courts below, three have upheld the validity of §188.045, RSMo Supp. 1975 and three have invalidated that statute.

The United States District Court for the Eastern District of Missouri, first acting as a panel of three judges, and again acting as a single judge, held that since Missouri is constitutionally entitled to the written informed consents

of patients seeking abortion services,[3] and because termination of parental rights is a possible consequence of the decision to abort, absent a party with standing to challenge §188.040, Missouri may permissibly require physicians to perform the function demanded of them by §188.045. 443 F.Supp. 1390, 1391 (E.D.Mo. 1978); pp. 18-A-19-A, *infra*.

Both lower courts have agreed that the appellees are without standing to challenge the parental rights termination provisions of §188.040, RSMo Supp. 1975. Therefore, in Missouri, the birth of a live child following an abortion attempt has, as one of its natural consequences, the effect on parental rights provided for by §188.040. The District Court correctly held that the *Planned Parenthood* case effectively disposes of the appellees' challenge against the constitutionality of §188.045.

Section 188.045 requires only that a physician advise his patient before an abortion of the terms of §188.040. So advising a patient should be an important aspect of obtaining a woman's informed consent. Not to do so would deprive her of the opportunity to make her decision in light of all significant and relevant factors.

The Eighth Circuit invalidated §188.045 because of that court's concern that the section would put physicians in a straitjacket by first requiring "the physician to warn his patient of consequences that *should not* occur" (emphasis added), and, secondly, because the requirement that the physician tell his patient of §188.040 is not reasonably

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3. *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 67, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976).

> "The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent."

related to the purpose of informed consent. *Freiman* v. *Ashcroft*, 584 F.2d 247, 251 (8th Cir. 1978); included in the appendix herein at p. A-1, *infra*. Although it is true that the Missouri statutes do not sanction, generally, the abortion of post-viable infants, that does not necessarily mean that the live births of infants out of attempted abortion procedures is impossible. In determining the period of gestation, the appellees, and other physicians, must rely on information supplied to them by their patients with respect to the date of conception. Because a doctor believes he is performing an abortion during the first twelve weeks of gestation does not guarantee that that is the case. Furthermore, technological advances will increase the ability of the medical profession to preserve the lives of fetuses born during the earlier stages of pregnancy. Certainly, there is nothing in §188.045 which would prohibit the appellees or other physicians from informing their patients that no abortion attempted during the first twelve weeks of gestation, to date, has resulted in a live-born child. Section 188.040 comes into effect only if an abortion is attempted on a viable fetus. Section 188.045 leaves the appellees free to advise their patients of the likelihood of the fetuses they carry being viable. Because a live birth should not occur in the abortion-related medical practice of appellees or under the Missouri statutes, does not mean that it *could not* happen nor that informing patients of the provisions of §188.040 is necessarily meaningless.

Likewise, §188.045 is not automatically unconstitutional for failure to distinguish on the basis of trimesters. See *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), in which this Court upheld a patient consent requirement and a record-keeping requirement, neither of which distinguished on the basis of trimesters, and *Bellotti* v. *Baird*, 428 U.S. 132, 149-150, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976).

Although the lower court was without jurisdiction to so decide, because these appellees lack standing to challenge the constitutionality of §188.040, it is clear on the face of the opinion below that the real justification for invalidating §188.045 was the belief of the Eighth Circuit that §188.040 is patently unconstitutional. The lower court cited *Wynn* v. *Scott*, 449 F.Supp. 1302, 1322-1324 (N.D.Ill. 1978) to support that conclusion. The court in *Doe* v. *Rampton*, 366 F.Supp. 189, 193 (D.Utah 1973), also voided a termination of parental rights provision of a state law. However, this Court, and the federal courts of appeal, have never conclusively determined that a statutory provision like §188.040 is unconstitutional. Because these appellees were inappropriate plaintiffs, the Eighth Circuit also was not able to do so. In effect, the Eighth Circuit found §188.045 to be unconstitutional because it did not like the provisions of §188.040, which provisions were not properly before it.

Standing alone, as it must for the present inquiry, §188.045 permissibly requires a physician, in order to obtain an informed consent to an abortion procedure, to advise his patient that parental rights over a live-born infant could be terminated.

The appellant Attorney General submits that §188.040 is not patently violative of the due process clause. At the very least, the Court of Appeals should have afforded the state the opportunity, before invalidating §188.045 upon the basis that §188.040 was unconstitutional, to show to the District Court that the termination of parental rights provisions of the Missouri law gives ample due process safeguards to the consenting parents of children born live out of attempted abortions. Because the appellees' challenge against §188.040 was dismissed because they lacked standing, the state was never required to support the merits of §188.040 by evidence or legal argument in the District Court.

In *Roe* v. *Wade*, 410 U.S. 113, 163-164, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), this Court stated:

> "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion . . ."

Certainly, if Missouri can constitutionally prohibit abortion after viability in the interest of protecting *potential* human life, then *after a* woman has had her pregnancy terminated, Missouri can protect the *actual* life of a fetus who survives the procedure thereby conclusively proving that he or she was viable at the time the abortion was performed.

In Missouri "viability" is defined as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." Section 188.015, RSMo Supp. 1975. That definition was approved by the United States Supreme Court in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 63-65, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976). By definition, §188.040 can become effective only with respect to post-viable human beings. If the state can proscribe abortion altogether after viability, as the Supreme Court said it could in *Roe* v. *Wade*, then it must have authority to enact provisions effecting the care and custody of children resulting from post-viable abortion attempts. The appellants submit that §188.040 is not patently unconstitutional. Had the appellees had the requisite standing, the state could have

shown that §188.040 included sufficient due process safeguards to satisfy the Fourteenth Amendment. Section 188.045 requires only that physicians inform their patients of another statute which the state has enacted effecting the care and custody of children resulting from post-viable abortion attempts.

Implicit in the position taken by the appellees before the lower courts, and in the position enunciated by the Court of Appeals, is the proposition that informing female patients of the parental rights statute may adversely influence individual decisions whether to abort. However, in answer to the interrogatories before the District Court, these appellees indicated that this had never occurred in their medical practice. If a woman were to change her mind solely as a result of being informed of the parental rights provision, then arguably her initial decision to terminate her pregnancy was extremely tenuous. For that patient, not obtaining abortion may have been best. Irregardless, physicians are not placed in a straitjacket because they can inform their patients that a live birth has never resulted during the first twelve weeks of gestation. These appellees claim never to perform abortions except during the first twelve weeks of pregnancy, if in fact the information they have been given by their patients with respect to the period of gestation is accurate. The compliance by the appellees with §188.045 should assist them in insuring that their patients give accurate information with respect to the length of pregnancy so as to assist them in determining whether the abortion sought by the patient is a legal one.

Section 188.040, at present, is a valid and effective portion of the statutory law of the State of Missouri. That statute represents a potential impact on every abortion procedure performed. Section 188.045 permissibly protects the state interest, found to exist by the Court of Appeals, in protecting mothers by requiring informed consents to abortion decisions. In Missouri, that consent cannot truly be informed and enlightened absent the knowledge, of the patient, that the parental rights statute exists.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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January, 1979

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1144

Michael Freiman, M.D., and Allen S. Palmer, D.O.,
Appellants,

v.

John D. Ashcroft, Attorney General of the State of Missouri and J. Brendan Ryan, Circuit Attorney of the City of St. Louis, Missouri,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: June 14, 1978
Filed: September 13, 1978

Before STEPHENSON, Circuit Judge, INGRAHAM,* Senior Circuit Judge, and HENLEY, Circuit Judge.

STEPHENSON, Circuit Judge.

The issues before this court are: (1) does appellant-physician Michael Freiman have standing to challenge Mo. Ann. Stat. § 188.040 (Vernon 1978), and, if so, is section 188.040 constitutional; and (2) is Mo. Ann. Stat. § 188.045 (Vernon 1978) constitutional.

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*The Honorable Joe M. Ingraham, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

Freiman orginally filed suit seeking declaratory and injunctive relief, and moved for summary judgment. The three-judge district court[1] held that Freiman did not have standing to challenge section 188.040. Section 188.040 provides:

> In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant to section 211.411, RSMo. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant. [Section 211.411 probably should read 211.441.]

The court held that Freiman did have standing to challenge section 188.045. Section 188.045 provides:

> Any woman seeking an abortion in the state of Missouri shall be verbally informed of the provisions of section 188.040 by the attending physician and the woman shall certify in writing that she has been so informed.

The court, however, did not find section 188.045 to be unconstitutional. Thus Freiman's motion for summary judgment was denied. Appellee John D. Ashcroft, Attorney General of Missouri, then moved for summary judgment

1. The Honorable William H. Webster, former United States Circuit Judge for the Eighth Circuit, The Honorable H. Kenneth Wangelin, United States District Judge for the Eastern District of Missouri, and The Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri.

dismissing this cause, which was granted by the district court.[2]

Because section 188.045 is a violation of the due process and equal protection clauses of the Fourteenth Amendment, we reverse in part.

The standing of physicians to challenge section 188.040 of the Missouri statutes was previously litigated in *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1975). In *Danforth*, the Supreme Court denied standing, stating:

> The physician-appellants do not contend that this section of the Act [Mo. Rev. Stat. § 188.040 (Vernon 1978)] imposes any obligation on them or that its operation otherwise injures them in fact. They do not claim any interest in the question of who receives custody that is "sufficiently concrete" to satisfy the "case or controversy" requirement of a federal court's Art. III jurisdiction. *Singleton* v. *Wulff*, [428 U.S. 106, 112 (1975)]. Accordingly, the physician-appellants do not have standing to challenge §7 of the Act [Mo. Rev. Stat. § 188.040 (Vernon 1978)].

Id. at 62 n.2.

On the basis of the Supreme Court's holding, the three-judge district court in this case held that the *Singleton* requirement of injury in fact was not satisfied sufficiently to establish Freiman's standing to challenge section 188.040. *Freiman* v. *Ashcroft*, 440 F. Supp. 1193 (E.D. Mo. 1977).

This court has also once before commented upon standing of physicians to challenge a very similar statute. In *Hodgson* v. *Lawson*, 542 F.2d 1350 (8th Cir. 1976), this court considered the constitutionality of Minn. Stat. Ann.

2. The Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri.

§ 145.415(3) (Supp. 1978), which reads in part: "[W]henever an abortion of a potentially viable fetus results in a live birth, the child shall be an abandoned ward of the state and the parents shall have no parental rights or obligations * * *." *Id.* In *Hodgson*, this court found the statute to be unconstitutional because of its use of the phrase "potentially viable," but we additionally noted:

> The constitutionality of Minn.Stat. § 145.415, subd. 3 * * * is also highly questionable for reasons not advanced by the appellees here. *See Doe* v. *Rampton*, 366 F.Supp. 189, 193 (C.D. Utah 1973), where a similar statutory provision was struck down because it provided for termination of parental rights without due process of law. *The physician-appellees here, as in Planned Parenthood of Central Missouri* v. *Danforth*, [428 U.S. 52, 62 n.2 (1975)], *would not have standing to challenge subd. 3 because they cannot claim any injury in fact.*

Hodgson v. *Lawson, supra*, 542 F.2d at 1355 n.2 (emphasis added).

The recognition that Freiman has standing to challenge section 188.045 does not alter his lack of standing to challenge section 188.040. Section 188.045 places a duty upon Freiman, and related statutes subject him to sanctions, including criminal penalties, for failure to perform that duty. *See* Mo. Stat. Ann. §§ 188.065 & .075 (Vernon 1978). His allegations that concern direct injury to him,[3] via the

---

3. In particular, plaintiff alleges in his affidavit:

> 4. The possibility of a live birth resulting from an abortion performed within the present medical practice of plaintiff is totally non-existent [within first trimester] and has never occurred in recorded medical history; and yet, the duty imposed by the legislation herein challenged is

(*Continued on following page*)

doctor-patient relationship, are all tied to section 188.045; however, the allegations fail to provide a basis for standing to challenge section 188.040. Because Freiman must establish his own standing as a prerequisite to asserting the rights of his patients, *see Singleton* v. *Wulff*, 428 U.S. 106, 112 (1975), the constitutionality of the statute which provides for termination of parental rights cannot be dealt with here. This disposal is not without difficulty, for as Judge Webster, in his concurrence in the lower court opinion points out, "[Section 188.040] is perhaps the most offensive of the *in terrorem* clauses that were enacted by the Missouri legislature in 1974 * * *. This patently unconstitutional appendage totally lacking in due process, survives like the last leaf in winter after *Planned Parenthood of Central Missouri* v. *Danforth* [*supra*] * * *. It is regrettable that a Jane Doe does not come forward so that this question may be squarely addressed." *Freiman* v. *Ashcroft, supra*, 440 F. Supp. at 1195 (Webster, J., concurring).

Freiman, as the three-judge district court recognized, does have standing to challenge section 188.045. *Id.* The district court erred, however, when it held section 188.045 constitutional on the basis of *Danforth's* provision that a state may permissibly require a woman's prior informed

---

Footnote continued—

> highly adverse to the best health interests of his patients and has the reasonable possibility of having catastrophic effects upon some patients.
>
> 5. * * * The provisions as to the termination of parental rights is highly disturbing to the patient and increases her anxiety during the medical procedure, thereby raising the risks of mortality and morbidity to her.
>
> 6. * * * requires the physician by law to provide information to the patient which is adverse to the customary practice of medicine, which he does not believe to be in her best interests, and which requires the physician to jeopardize the health, interests and safety of his patient.

consent for an abortion.[4] *Freiman* v. *Ashcroft*, No. 76-616C(3) (E.D. Mo. filed Feb. 17, 1978).

The Supreme Court in *Roe* v. *Wade*, 410 U.S. 113 (1973), recognized that a fundamental constitutional right of personal privacy exists.

> This right of privacy * * * is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physicial health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

Id. at 153. Although the privacy right is not absolute, and is therefore subject to the state's interests in the health and welfare of its citizens, "[w]here certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' * * * and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Id.* at 155.

4. After the three-judge district court denied Freiman's motion for summary judgment, Freiman amended his complaint by deleting the request for injunctive relief. The district court then granted Ashcroft's motion for summary judgment holding section 188.045 constitutional.

The legitimate state interest at stake here is protecting the mother by requiring an informed consent to the abortion decision. The Court in *Danforth* held that Mo. Ann. Stat. § 188.020(2) (Vernon 1978),[5] Missouri's informed consent provision, was not "in itself an unconstitutional requirement. The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." *Planned Parenthood* v. *Danforth, supra,* 428 U.S. at 67. But the Supreme Court did not hold that a state may require physicians to provide to each patient any and all information required by the state, regardless of its legality, truth, constitutionality or medical advisability.[6] "[W]e are content to accept, as the meaning [of informed consent], the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straightjacket in the practice of his profession." *Planned Parenthood* v. *Danforth, supra,* 428 U.S. at 67 n.8. Section 188.045 is not sufficiently "narrowly drawn to express only the legitimate state interests at stake." *Roe* v. *Wade, supra,* 410 U.S. at 155.

5. Section 188.020(2) provides in part:

> No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:
>
> * * *
>
> (2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion[.]

6. Appellees admitted in oral argument that there has never been a live birth during the first 12 weeks of gestation and that under the present state of medical science it is impossible.

The information that section 188.045 requires the physician to relate to his patient prior to an abortion operation would most certainly put the physician in a straitjacket. It first requires the physician to warn his patient of consequences that should not occur, as the Missouri Act was written to prevent just such an event. The statutes provide that no abortion may be performed—unless it is to preserve the life or the health of the mother—without the physician first certifying that the fetus is not viable.[7] Section 188.040's provision for termination of parental rights only occurs if a live born infant results from an attempted abortion which was not performed to save the life or health of the mother. Thus, the warning, that if a live born infant results parental rights will be terminated, is for all practical purposes meaningless. By definition, this should not result.

Secondly, although requiring the physician to tell his patient what will be done to accomplish the abortion and what the consequences will be assists the patient in being able to give an informed consent, *Planned Parenthood* v. *Danforth, supra,* 428 U.S. at 66-67, the requirement that the physician tell his patient of section 188.040 is not reasonably related to the purpose of informed consent. Initially, section 188.045 makes no distinction between trimesters and thus is overbroad. Then the statute which section 188.045 requires the physician to relate to his patient is patently a denial of procedural due process,[8] and further, there is no record of an unsuccessful abortion performed during the first 12 weeks of gestation resulting in a live born infant. The result of a physician's warning would be to inject into the decision-making process be-

7. Mo. Ann. Stat. § 188.030 (Vernon 1978).

8. *See Wynn* v. *Scott,* 449 F. Supp. 1302, 1322-24 (N.D. Ill. 1978).

tween physician and patient a factor which is irrelevant and extraneous to the medical services being rendered. Section 188.045's imposition upon the physician to inform his patient of section 188.040 is a violation of the equal protection clause of the Fourteenth Amendment inasmuch as it singles out the abortion operation for the imposition of this "straitjacket" requirement. It is a violation of the due process clause because of the invasion into the delicate and private physician-patient relationship. Requiring the physician to relate section 188.040 interferes with the woman's right to consult with her physician concerning her decision of abortion without undue restriction by the state. *See Wynn* v. *Scott, supra,* 449 F. Supp. at 1316-17. Thus this court finds section 188.045 to be unconstitutional.

Affirmed in part; reversed in part.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 76-616C(3)

MICHAEL FREIMAN, M.D., et al.,
Plaintiffs,

vs.

JOHN D. ASHCROFT, et al.,
Defendants.

ORDER

(Filed November 28, 1977)

Pursuant to the memorandum filed this date,

IT IS HEREBY ORDERED that plaintiffs lack standing to challenge §188.040, R.S.Mo. (1974).

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment be and is denied.

/s/ William H. Webster
William H. Webster
United States Circuit Judge

/s/ H. Kenneth Wangelin
H. Kenneth Wangelin
United States District Judge

/s/ John F. Nangle
John F. Nangle
United States District Judge

Dated: November 28, 1977.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 76-616C(3)

MICHAEL FREIMAN, M.D., et al.,
Plaintiffs,

vs.

JOHN D. ASHCROFT, et al.,
Defendants.

MEMORANDUM

(Filed November 28, 1977)

This matter is before the Court upon plaintiffs' motion for summary judgment. Plaintiffs, who are physicians, filed this suit seeking declaratory and injunctive relief against the enforcement of §§188.040 and 188.045, R.S.Mo. (1974). Jurisdiction is based upon the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, and 28 U.S.C. §§1331 and 1343. A three-judge Court was empaneled on July 9, 1976.

Section 188.040 provides:

> In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant

to section 211.411 [sic] RSMo. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant.[1]

Section 188.045 provides:

Any woman seeking an abortion in the state of Missouri shall be verbally informed of the provisions of section 188.040 by the attending physician and the woman shall certify in writing that she has been so informed.

Plaintiffs allege that they are physicians who perform abortions within the first twelve weeks of gestation; that the possibility of a live birth resulting from an abortion performed within the first twelve weeks is totally nonexistent; that the legislation under attack herein, inhibits, chills, restrains, deters and precludes plaintiffs' patients from the full exercise of their constitutional rights; that the privacy of the physician-patient relationship is curtailed and chilled by this legislation, and that plaintiff-physicians are inhibited and precluded from the practice of medicine in their finest manner by the existence and application of this legislation.

In opposition to plaintiffs' motion for summary judgment, defendants have raised the question of standing. In *Singleton* v. *Wulff*, 44 U.S.L.W. 5213 (1976) the Court noted that there were two standing issues presented in the context of a challenge to abortion-related legislation by physicians. The first issue is whether the physicians

> . . . allege "injury in fact," that is, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy subject to a federal court's art. III jurisdiction . . . . *Id.* at 5215.

1. The reference to section 211.411 should probably read "section 211.441".

The second issue is whether the physicians should be allowed to assert the rights of third parties. In *Singleton*, the challenge was to legislation prohibiting the application of Medicaid benefits to abortions. The Court held that the physicians satisfied the first requirement of standing, the necessary concrete interest, since they would benefit monetarily if the statute were struck down. The Court then proceeded to determine that the physicians could assert the rights of their patients.

In *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), the Court held that Baird had standing to challenge a Massachusetts law prohibiting the dispensing of contraceptive devices in certain contexts since Baird had been convicted of violating that law. In *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), appellants were held to have standing as they, too, were convicted of violating a statute regulating contraceptives. In *Barrows* v. *Jackson*, 346 U.S. 249 (1953), a defendant was allowed to raise a constitutional challenge to a restrictive covenant where the defendant would suffer economic injury as a result of the suit. In *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) a private school was allowed to assert the rights of parents and guardians where the school's standing was based on its property rights. In all these cases, the party asserting the constitutional challenge had standing in his own right; it was only after this standing was determined that the Court determined whether the rights of third parties could be asserted.

In *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958), the Court did not determine the standing of the N.A.A.C.P. in advance of a consideration of its ability to assert the rights of its members. This case is distinguishable, however. The N.A.A.C.P. was an association whose members acted as a body, and thus the association and its members were identical. Additionally, the Court noted that in the con-

text that existed therein, the members would lose the constitutional right asserted "at the very moment of its assertion". *Id.* at 459. The same situation does not exist herein. Accordingly, the Court concludes that the physicians must establish their own standing to challenge the legislation herein in advance of a determination of their ability to assert the rights of third parties.

It is apparent that plaintiffs have standing to challenge §188.045. The requirements of that section subjects them to possible revocation of license and criminal sanctions. See §§188.065 and 188.075, R.S.Mo. (1974). The Court must conclude, however, that plaintiffs lack standing to challenge §188.040. As stated in *Planned Parenthood of Central Missouri* v. *Danforth*, 44 U.S.L.W. 5197, 5200 at footnote 2 (1976)

> The physician-appellants do not contend that this section [188.040] of the Act imposes any obligation on them or that its operation otherwise injures them in fact. They do not claim any interest in the question of who receives custody that is "sufficiently concrete" to satisfy the "case or controversy" requirement of a federal court's Art. III jurisdiction.

Simply because plaintiffs have standing to challenge §188.045 does not mean that they can assert the rights of third parties, their patients, in order to challenge §188.040. Before the Court determines whether a plaintiff may assert the rights of third parties, the plaintiff's standing to challenge the legislation must be established. Plaintiffs have not established their standing to challenge §188.040. *Planned Parenthood, supra.*

With only §188.045 remaining, it is clear that plaintiffs' motion for summary judgment must be denied. In *Planned Parenthood, supra,* the Court held that a state may permissibly require a woman's prior written consent,

noting that "it is desirable and imperative that it [the decision to abort] be made with full knowledge of its nature and consequences". *Id.* at 5201. *Cf., Whalen* v. *Roe,* 45 U.S.L.W. 4166 (1977) (holding that stringent prescription recording requirements do not violate any constitutional rights of physicians).

Accordingly, plaintiffs' motion will be denied.

/s/ H. Kenneth Wangelin
H. Kenneth Wangelin
United States District Judge

/s/ John F. Nangle
John F. Nangle
United States District Judge

WEBSTER, Circuit Judge, concurring.

I reluctantly concur.

Section 7 (R.S. Mo. 1974 §188.040) is perhaps the most offensive of the *in terrorem* clauses that were enacted by the Missouri legislature in 1974, H.C.S. House Bill No. 1211, because it reflects a legislative conclusion that a woman who asserts her constitutional right to an abortion has thereby become unfit for parenthood if the child is somehow born alive. *See Planned Parenthood of Central Missouri* v. *Danforth,* 392 F. Supp. 1362, 1377 (E.D. Mo. 1975) (Webster, J., dissenting). This patently unconstitutional appendage, totally lacking in due process, survives like the last leaf in winter after *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U.S. 52 (1976). It is regrettable that a Jane Doe does not come forward so that this question may be squarely addressed. Plaintiffs say this is unlikely because it is difficult to protect a pregnant woman's anonymity. At this stage, at least, that is an in-

sufficient answer to the presently insurmountable requirement of standing.

/s/ William H. Webster
William H. Webster
United States Circuit Judge

Dated: November 28, 1977.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 76-616C(3)

MICHAEL FREIMAN, M.D., et al.,
Plaintiffs,

vs.

JOHN D. ASHCROFT, et al.,
Defendants.

ORDER

(Filed February 17, 1978)

Pursuant to the memorandum filed this date,

IT IS HEREBY ORDERED that defendants' motion for summary judgment be and is granted and that this cause be and is dismissed.

/s/ John F. Nangle
United States District Judge

Dated: February 17, 1978.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 76-616C(3)

MICHAEL FREIMAN, M.D., et al.,
Plaintiffs,

vs.

JOHN D. ASHCROFT, et al.,
Defendants.

MEMORANDUM

(Filed February 17, 1978)

This matter is before the Court upon defendants' motion for summary judgment. Plaintiff physicians filed this suit seeking declaratory and injunctive relief against the enforcement of §§188.040 and 188.045, R.S.Mo. (1974). By order of this Court dated November 28, 1977, it was held that plaintiffs lack standing to challenge §188.040. Plaintiffs were granted leave on February 15, 1978 to amend their complaint by deleting the request for injunctive relief. Under these circumstances, a three-judge court is no longer necessary. *Seergy* v. *Kings County Republic County Committee*, 459 F.2d 308 (2d Cir. 1972). In response to the instant motion, plaintiffs have raised no facts which are disputed so as to preclude entry of summary judgment. Rule 56, Federal Rules of Civil Procedure.

Section 188.045, R.S.Mo. (1974) provides:

> Any woman seeking an abortion in the state of Missouri shall be verbally informed of the provisions of section 188.040 [terminating parental rights in cases

> where a live birth results from an attempted abortion not performed to save the life or health of the mother] by the attending physician and the woman shall certify in writing that she has been so informed.

Plaintiffs allege that this legislation inhibits, chills, restrains, deters and precludes plaintiffs' patients from the full exercise of their constitutional rights; that the privacy of the physician-patient relationship is curtailed and chilled; and that plaintiffs are inhibited and precluded from the practice of medicine in their finest manner by the existence and application of the statute.

In *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), the Court held that a state may permissibly require written consent, as "it is desirable and imperative that it [the decision to abort] be made with full knowledge of its nature and consequences". *Id.* at 67. Certainly, the termination of parental rights, should a live birth result, is a consequence of the decision to abort. Absent a party with standing to challenge §188.040, termination of parental rights does remain a consequence of the decision to abort and the state may permissibly require a physician to so inform the patient. When viewed in this context the statute is clearly permissible. *Cf.*, *Whalen* v. *Roe*, 429 U.S. 589 (1977). Accordingly, the Court concludes that defendants' motion should be granted.

/s/ John F. Nangle
United States District Judge

Dated: February 17, 1978.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1144

Michael Freiman, M.D., and Allen S. Palmer, D.O.,
Appellants,

v.

John D. Ashcroft, Attorney General of the State of Missouri, and J. Brendan Ryan, Circuit Attorney of the City of St. Louis, Missouri,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Filed: October 10, 1978

Before STEPHENSON, Circuit Judge, INGRAHAM,* Senior Circuit Judge, and HENLEY, Circuit Judge.

ORDER ON APPELLANTS' PETITION FOR REHEARING

Appellants in their petition for rehearing seek an award of attorney fees incurred on appeal. Appellants also pray that this court remand this cause to the district court for an award of reasonable attorney fees at the trial level. Upon invitation of the court, appellees filed a reply praying that this court deny appellants' petition for rehearing.

*The Honorable Joe M. Ingraham, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

After considering the matter, it is ordered that appellants are awarded the sum of $500.00 attorney fees incurred in this appeal. This cause is further remanded to the district court for an award of reasonable attorney fees at the trial level. All attorney fees are to be awarded against defendants-appellees in their official capacities only.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1144

MICHAEL FREIMAN, M.D., and,
ALLEN S. PALMER, D.O.
Plaintiffs-Appellants,

v.

JOHN D. ASHCROFT, Attorney General, State of Missouri, and, J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri,
Defendants-Appellees.

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

(Filed December 14, 1978)

Notice is hereby given that John D. Ashcroft, Attorney General of the State of Missouri, and one of the named defendants-appellees in the above-referenced legal proceeding, hereby appeals to the Supreme Court of the United States, from that portion of the final order and opinion, filed by this Court on September 13, 1978, which reverses the decision of the United States District Court for the Eastern District of Missouri, in part, by holding unconstitutional Section 188.045, RSMo Supp. 1975.

This Court entered its order disposing of the appellants' Petition for Rehearing on October 10, 1978, which Petition for Rehearing tolled the running of the 90-day period in which to file a notice of appeal to the United States Supreme Court. *Department of Banking* v. *Pink*,

317 U.S. 264, 266, 63 S.Ct. 233, 87 L.Ed. 254 (1942); *Forman* v. *United States*, 361 U.S. 416, 426, 80 S.Ct. 481, 4 L.Ed.2d 412 (1960); *Pfister* v. *Northern Illinois Finance Corporation*, 317 U.S. 144, 149-150, 63 S.Ct. 133, 87 L.Ed. 146 (1942).

This appeal is taken pursuant to 28 U.S.C. §1254(2).

Respectfully submitted,

John Ashcroft
Attorney General

/s/ Michael L. Boicourt
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed postage prepaid this 12th day of December, 1978, to:

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All parties required to be served have been served.

/s/ Michael L. Boicourt
Michael L. Boicourt

Supreme Court, U. S.
FILED
FEB 7 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-1102

JOHN D. ASHCROFT, Attorney General of the State of Missouri,
and
GEORGE A. PEACH, Circuit Attorney of the City of St. Louis, Missouri,
Defendants-Appellants,

vs.

MICHAEL FREIMAN, M.D. and ALLEN S. PALMER, D.O.,
Plaintiffs-Appellees.

On Appeal from the United States Court of Appeals for the
Eighth Judicial Circuit

MOTION OF PLAINTIFFS-APPELLEES TO AFFIRM THE JUDGMENT SOUGHT TO BE REVIEWED AND BRIEF OF PLAINTIFFS-APPELLEES IN SUPPORT THEREOF

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-1102

JOHN D. ASHCROFT, Attorney General of the State of Missouri,
and
GEORGE A. PEACH, Circuit Attorney of the City of St. Louis, Missouri,
Defendants-Appellants,

vs.

MICHAEL FREIMAN, M.D. and ALLEN S. PALMER, D.O.,
Plaintiffs-Appellees.

On Appeal from the United States Court of Appeals for the Eighth Judicial Circuit

MOTION OF PLAINTIFFS-APPELLEES TO AFFIRM THE JUDGMENT SOUGHT TO BE REVIEWED

Come now plaintiffs-appellees and, pursuant to Rule 16 of the Supreme Court Rules (Title 28, U.S.C.A.), move this Honorable Court to affirm the "Memorandum Opinion and Judgment" of May 18, 1973 and the "Order Denying Motion to Modify" of June 20, 1973, as unanimously rendered by the United States Court of Appeals for the Eighth Judicial Circuit, in Appeal No. 78-1144, reported at 584 F.2d 247 (8th Cir. 1978), the Honorable Roy L. Stephenson, Circuit Judge,

Joe McDonald Ingraham, Senior Circuit Judge, and J. Smith Henley, Circuit Judge, presiding.

Plaintiffs-Appellees so move to affirm on the ground that it is manifest that the federal questions raised by defendants-appellants, on which the decision of this cause depends, are so unsubstantial as to need no further argument nor adjudication.

WHEREFORE, plaintiffs-appellees pray this Honorable Court to affirm the decision herein appealed.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-1102

JOHN D. ASHCROFT, Attorney General of the State of Missouri,
and
GEORGE A. PEACH, Circuit Attorney of the City of St. Louis, Missouri,
Defendants-Appellants,

vs.

MICHAEL FREIMAN, M.D. and ALLEN S. PALMER, D.O.,
Plaintiffs-Appellees.

On Appeal from the United States Court of Appeals for the
Eighth Judicial Circuit

BRIEF OF PLAINTIFFS-APPELLEES IN SUPPORT OF THEIR MOTION TO AFFIRM THE JUDGMENT SOUGHT TO BE REVIEWED

INTRODUCTION

Plaintiffs-Appellees, for the sake of brevity and the avoidance of unnecessary repetition, adopt by reference the sections of defendant-appellants' Jurisdictional Statement entitled "Jurisdictional Statement" (Jur.St., pp.1-2), "Opinions Below" (Jur.St., p.2), "Jurisdiction" (Jur.St., pp.2-3), "Constitutional Provisions and State Statutes" (Jur.St., pp.3-4) and "Appendix" (Jur.St., pp.1-A through 23-A).

ARGUMENT

A. The Burden Upon Appellants.

This Honorable Court has clearly recognized that the burden of justifying the type of legislation challenged here, which infringes upon the right of a woman and her physician to terminate a pregnancy, lies heavily upon the appellants.

> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.' " *Roe* v. *Wade*, 410 U.S. 113, 155 (1973). See, *Paris Adult Theatre I* v. *Slayton*, 413 U.S. 49, 65 (1973).

This principle is particularly applicable where "one's beliefs, ideas, politics, religion, cultural concerns, and the like" become involved; a situation present at bar. *The California Bankers Association* v. *Schultz*, 416 U.S. 21, 86 (1974). See, Gelinas, "Roe *v.* Wade *and* Doe *v.* Bolton: *The Compelling State Interest Test in Substantive Due Process,*" 30 WASH. & LEE L.REV. 628 (1973).

> "Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." *O'Connor* v. *Donaldson*, 422 U.S. 563, 575 (1975).

The corollary to the "compelling state interest" requirement, "that legislative enactment must be narrowly drawn to express only the legitimate state interests at stake" (*Roe, supra,* 410 U.S. at 155), must also be applied here. It is the "government's burden to demonstrate an overriding interest in order to validate an encroachment on protected interests, . . . cases of doubt being resolved in favor of the . . . [challengers]." *Elrod* v. *Burns*, 427 U.S. 347, 368 (1976). See, *The California Bankers Association, supra,* 416 U.S. at 86.

> ". . . up to the points where important state interests provide compelling justifications for intervention, 'the abortion decision *in all its aspects* is inherently, and primarily, a medical decision,'." *Colautti* v. *Franklin*, 47 LW 4094, 4096 (Jan. 9, 1979).

B. The Merits.

Section 188.040 provides for the arbitrary and conclusive termination of parental rights in the event a live birth results, when an abortion had been intended. It applies to all patients (unless the procedure is life-saving) and to consenting fathers. It applies indiscriminately to all stages of pregnancy despite this Honorable Court's specific prohibitions in *Roe, supra,* 410 U.S. at 163-165. See, *Word* v. *Poelker*, 495 F.2d 1349, 1351 (8th Cir. 1974). It is a crude and coercive threat to dissuade women from freely electing abortion. It is totally unrelated to the concern of maternal health, as uncontradicted by the factual record below, despite the fact that this is the only justification for abortion legislation prior to the point of viability. *Roe, supra,* 410 U.S. at 163-165.

It adopts the dogmatic philosophy of those opposed to abortion under all circumstances: *I.e.*, that abortion is the equivalent of murder. Desiring an abortion and the death of a fetus are not synonymous with desiring the death of a live child, in the event an abortion is not successful. An abortion may not initially be an available option, either for medical or other reasons, or it may be medically impossible once commenced (as envisioned by the statute). This irrebuttable presumption created by the challenged Section of "unfitness" of and/or "abandonment" by a patient electing an abortion, has been specifically rejected by a Florida Appellate Court,

> "Appellant further contends, apart from the question of the 'right to privacy' that the termination of a pregnancy

> illustrates and reflects the 'unfitness of the mother' or 'the abandonment' of the unborn child. . . . Appellant's contentions are equally tenuous and as a practical matter overlook the decisions of the United States Supreme Court . . . . We cannot conclude that a mother's decision to terminate a pregnancy gives rise to questions of 'unfitness' or 'abandonment'." *Jones* v. *Smith*, 278 So.2d 339, 343 (Fla.Ct.App. 1973), *cert denied*, 415 U.S. 958 (1974).

The prohibition against the incorporation into statutes of unwarranted presumptions has been reaffirmed in prior, related cases dealing with sexual (gender) preferences (*Weinberger* v. *Wiesenfeld*, 420 U.S. 636 [1975]), illegitimacy of children (*New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 [1973]), and pregnancy (*Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 [1974]). When governmental action "rests on an irrebutable presumption often contrary to fact . . . (i)t therefore lacks critical ingredients of due process." *United States Department of Agriculture* v. *Murry*, 413 U.S. 508, 514 (1973). It has been suggested that such presumptions may be a parameter and/or a surrogate of equal protection, as well as of due process. Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH.L.REV. 800 (1974); and Case Comment, *Constitutional Law: Court Substitutes Conclusive Presumption Approach for Equal Protection Analysis*, 58 MINN.L.REV. 965 (1973-1974).

Missouri statutes themselves recognize the lesser value of fetal life by classifying the taking of "the life of a premature infant aborted alive" as "murder of the second degree." (§ 188.035[2]). Absent such specific language, the taking of such life would be considered "murder in the first degree." MO.REV.STAT., § 559.010. In light of *Roe, supra*, this Section is no more sustainable than would be a similar effort to terminate parental rights of persons who experienced contraceptive failure.

Under identical circumstances, in *Doe* v. *Rampton*, 366 F. Supp. 189 (D.Utah 1973), the statute provided,

> "Child surviving abortion deemed ward of state.—Any child surviving an abortion shall become a ward of the state and the mother of such child and a father who has consented to such abortion shall have no parental rights with regard to such child." UTAH CODE ANN., § 76-7-311.

The unanimous federal panel held,

> "Section 76-7-311 is invalid because it threatens every woman who has an abortion, at any stage of pregnancy and for any reason, with termination of parental rights without due process of law." 366 F.Supp. at 193.

Roe, supra, clearly stands for the principle that a pre-viable fetus is not the equivalent at law of a living person. "(T)he word 'person', as used in the Fourteenth Amendment, does not include the unborn." *Roe, supra*, 410 U.S. at 158. This distinction is further demonstrated by the total statutory scheme's permissive stance towards abortion under certain circumstances and conditions.

As this Honorable Court noted in *Stanley* v. *Illinois*, 405 U.S. 645 (1972), when offering full protection to the rights of putative fathers in regard to their children,

> "Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.
>
> . . .
>
> "We have concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause." 405 U.S. at 658.

There are no other statutory provisions providing for arbitrary and conclusive termination of parental rights under any other factual situation. Parents of children who commit upon them the greatest abuses, even acts threatening their very lives, are not subject to the gross denial of due process and equal protection attempted here. This vindictive excessive exercise of state power to punish and to deter women from choosing abortion must not be allowed to persist. Nor must the continual assault upon their sensitivities and emotions before undergoing surgery be tolerated any longer.

It is no more reasonable for the state to assume that a woman, who is denied an abortion initially for medical reasons prior to the procedure, is any less committed to the abortion than a woman who is denied an abortion because the intended result of the procedure did not occur during the course of the procedure. Yet, clearly, many women, unable for medical reasons to undergo an abortion, choose to rear the children born to them as loving parents. The singular and obvious purpose of challenged §188.040 is to coerce, to harass and to intimidate women into the choice of carrying to term as opposed to the choice of terminating the pregnancy. Such coercion has been repeatedly denounced. *Wulff* v. *Singleton*, 508 F.2d 1211 (8th Cir. 1974), *reversed on other grounds*, 428 U.S. 106 (1976) and *Nyberg* v. *The City of Virginia*, 495 F. 2d 1342 (8th Cir. 1974), *appeal dismissed for want of jurisdiction*, 419 U.S. 891 (1974).

Challenged §188.040 is not reasonably susceptible to the strained construction suggested by appellants below that the procedures of Missouri Revised Statutes, §211.411, are to be utilized. The challenged Section clearly states, without qualification, that under the given circumstances, "such infant shall be an abandoned ward of the state." Later on, it states that the consenting parents "shall have no parental rights or obligations whatsoever relating to such infant, as if the parental

rights had been terminated pursuant to section 211.411 RSMo." The reference to "section 211.411 RSMo." is clearly and merely a descriptive phrase, defining and analogizing the finality of the rights being terminated. The challenged Section does not say that consenting parents "shall have no rights or obligations whatsoever, if the parental rights are terminated pursuant to section 211.411 RSMo." The words, "had been terminated", demonstrate that the termination is automatic and, in fact, has already occurred, if the conditions of consenting parties were present. The use of the word "as" denotes "to the same extent" or "to the same degree". *Webster's New Collegiate Dictionary.*

Secondly, even assuming, *arguendo*, appellants' strained construction, the Federal constitutional questions remain. As Circuit Judge Webster previously noted in dissent,

> "First, the statutory language rebuts any inference of an intended hearing. It states that as to such live born infant the parent who consented to the abortion 'shall have no parental rights or obligations *whatsoever, as if* the parental rights *had been* terminated pursuant to Section 211.411 [*sic*], RSMo.' (Emphasis added). The only interpretation which I can give to such clause is that parental rights are to be terminated upon the birth of the child as if all of the statutory procedures for termination of parental rights had already taken place. Significantly, Section 211.441, RSMo, does not make a child an abandoned ward of the state prior to hearing as does this Section 7. I do not understand the state to have argued for the construction placed upon Section 7 by the majority, and I cannot accept it. It seems to me abundantly clear that the state proposes to take a live born child away from its parents, if they consented to an abortion, because in the view of the state it was 'unwanted,' and for this reason alone the consenting parents have forfeited all rights to such child. This posture ignores entirely the range of alternatives available and assumes that because a mother

may for a variety of reasons have decided upon an abortion she would with certainty abandon the child if it should be born alive, or, more invidiously, that she thereby became unworthy to keep the child. No state has the right to make this judgment on a per se basis." *Planned Parenthood, supra,* 392 F.Supp. at 1377, *remanded on other grounds,* 428 U.S. 52 (1976).

The District Court found that §188.040 was not defective by reason of applying to all trimesters, because this Honorable Court approved written consent and record-keeping requirements in all trimesters in *Planned Parenthood, supra,* 428 U.S. at 65-67, 78-81. The District Court ignored the fact that this Honorable Court took great pains to point out the rational basis for those specific requirements at all levels of pregnancy. *Ibid.* Even assuming the rationale of the District Court, that reasonable protection of a woman's health justifies in some remote manner the challenged Section, the rationale for the same could only apply to women seeking abortions who are bearing viable fetuses.

The challenged Section itself is totally inconsistent with its supposed purpose of protecting live-born infants from their parents who had previously desired abortions. (1) The legislation terminates equally the parental rights when a live birth results of fathers (spousal and putative) who consented to the abortion and mothers who consented for reasons less than necessary to save their lives or health. (2) It does not terminate the parental rights when live birth results of fathers (spousal and putative) who strongly desire an abortion but do not evidence such feeling through a consent (since their consent is not required), mothers who strongly desire an abortion but forego the same by reason of the danger to their life or health and mothers who actually undergo a strongly desired abortion procedure necessary to save their lives or health, but which produces a live birth. No logical reason exists to assume that

parents in group "(1)" above pose any greater threat to their children than parents in group "(2)". Nor did appellants demonstrate any real threat by any parent to a child born, although an abortion was initially desired or intended.

Parents who, in actuality, do abuse their children, receive more rights of due process than the parents here, whom the state, because of its restrictive view on abortion, speculates *may* not be fit. The distinguishing characteristic between parents (as to whether or not they consent to the abortion) or between consenting parents (as to whether or not the procedure is necessary to save the life or health of the mother) is not rationally related to the parents' desire for an abortion nor to their attitude (actual or anticipated) toward the child once born. Parents with intense desires for an abortion may well be found in either group.

Section 188.040 places upon the physician-appellees the affirmative duty to determine in each case whether: (a) the procedure "was not performed to save the life or health of the mother"; (b) whether the mother consented to such abortion; and (c) whether the father consented to such abortion. After making said determinations and, if the answer to each is in the affirmative, the physician-appellees are compelled to "forthwith notify said juvenile court of the existence of such live born infant." Failure to properly make such determinations and to provide such notification, when required, subjects the physician to the penalties of §§ 188.065 and 188.075 of the challenged legislation. Section 188.045 requires appellees to verbally inform each patient of § 188.040 under threat of criminal sanctions.

Section 188.040 discriminates against children resulting from such abortions by denying to them the right to a relationship and its accompanying duties and rights with their natural mothers.

As succinctly stated previously by Judge William Webster in 1975, dissenting,

> "This section in my view contains an incurable constitutional flaw: it is totally lacking in procedural due process. . . .
>
> "The chilling effect of such legislation is so obvious as to require no further discussion; it clearly and explicitly exceeds regulation 'reasonably related to maternal health'." *Planned Parenthood of Central Missouri* v. *Danforth*, 392 F.Supp. 1362, 1377 (E.D.Mo. 1975), *remanded on other grounds*, 428 U.S. 52 (1976).

As more recently noted by Circuit Judge Webster,

> "Section 7 (R.S.Mo. 1974 §188.040) is perhaps the most offensive of the *in terrorem* clauses that were enacted by the Missouri legislature in 1974, H.C.S. House Bill No. 1211, because it reflects a legislative conclusion that a woman who asserts her constitutional right to an abortion has thereby become unfit for parenthood if the child is somehow born alive. See *Planned Parenthood of Central Missouri* v. *Danforth*, 392 F.Supp. 1362, 1377 (E.D.Mo. 1975) (Webster, J., dissenting). This patently unconstitutional appendage, totally lacking in due process, survives like the last leaf in winter after *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976)." *Freiman* v. *Ashcroft*, 440 F.Supp. 1193, 1195 (E.D.Mo. 1977).

Appellants seek to justify the constitutionality of Mo.R.S. §188.040 by relying on the Supreme Court's language in *Planned Parenthood, supra*, permitting a requirement of written consent to an abortion, that, ". . . it is desirable and imperative that it be made with full knowledge of its nature and consequences." 428 U.S. at 67. Appellants apparently believe that under the

mantle of that broad language, the state is free to mandate physicians to provide to each patient, any and all information required by the state, regardless of its legality, truth, constitutionality and medical advisability.

This Honorable Court, on the same page of its opinion as the language referred to above, *warned* that requiring an informed consent in any specific terms,

> ". . . might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession." 428 U.S. at 67, at n.8.

The challenged sections in this cause rigidly lock appellees into such restraints, by legislating the practice of medical consents.

Recently, an unanimous three-judge federal panel held as unconstitutional, requirements that the physician inform each abortion patient of,

> "(a) The physical competency of the fetus at the time the abortion is to be performed, such as, but not limited to, what the fetus looks like, fetus ability to move, swallow and its physical characteristics;
>
> "(b) The general dangers of abortion, including, but not limited to, the possibility of subsequent sterility, premature birth, live-born fetus and other dangers; . . ." Illinois House Bill 1851, Illinois Abortion Law of 1975, Section 3(2). *Wynn* v. *Scott*, 449 F.Supp. 1302, 1332 (N.D. Ill. 1978).

The panel, in language equally applicable here, held,

> "In *Danforth*, the Supreme Court upheld an informed consent provision which was identical to the first sentence of § 3(2) in the Illinois Act. The Court reasoned that requiring written informed consent does not in itself restrict

the decision of the patient and her physician. The Court noted that the decision to abort is 'important' and often 'stressful' and said that 'it is desirable and imperative that it be made with full knowledge of its nature and consequences.' The Court indicated that limits could be placed on the state's ability to regulate informed consent. If the provision at issue in *Danforth* had meant more than what would be done in an abortion and the consequences of the procedure, it 'might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession.' *Danforth, supra,* at 67 n.8. In his concurrence, Justice Stewart notes that atlhough a provision must not 'thwart a woman's decision, the state may try to ensure that the abortion decision is made in a knowing, intelligent, and voluntary fashion.'

. . .

"The holding in *Danforth* leaves no doubt that the first sentence of § 3(2) of the Illinois Abortion Act is constitutional. However, the guidelines discussed in *Danforth* raise serious doubts as to the validity of clauses (a) and (b). Plaintiffs argue with considerable force that those clauses thwart and restrict a woman's decision to have an abortion and they are not narrowly drawn to meet the state interest at stake, which is to insure that the woman is aware of her decision and of its significance. . . .

The clauses are . . . overly specific. . . . the very specificity of clauses (a) and (b) places the physician in a 'straitjacket' condemned in *Danforth. For example, a physician performing a first trimester abortion must tell the woman that there is a danger of a live-born fetus, when it is impossible that her abortion will result in a fetus born alive.* And the physician will tell the woman that there is a danger of subsequent sterility despite the fact that studies have not shown that this danger actually exists. . . .

"We conclude that §§ 3(2)(a) and (b) are unconstitutional." *Wynn, supra,* at 1316-1317.

In addition to the over specificity language in *Wynn, supra,* which applied here would void the challenged sections; the federal panel specifically held the following two sections unconstitutional.

"Section 7. In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the State wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant."

"Section 8. Any woman seeking an abortion in the State of Illinois, after viability, shall be verbally informed of the provisions of Section 7 of this Act by the attending physician and the woman shall certify in writing that she has been so informed." Illinois House Bill 1851, Illinois Abortion Law of 1975, Sections 7, 8. *Wynn, supra* at 1333.

The federal panel unanimously ruled,

"The court in *Doe* v. *Rampton,* 366 F.Supp. 189, 193 (D.Utah 1973), voided a similar provision because it threatended every woman with termination of parental rights without due process of law.

"Plaintiffs contend that § 7 is unconstitutional because it deprives the parents of their parental rights in the child without due process of law and because it creates an irrebuttable presumption of unfitness. We agree with the first contention and find it unnecessary to reach the second. *Compare Miller* v. *Carter,* 547 F.2d 1314, 1317 (7th Cir. 1977).

"All parents have constitutionally protected rights to have custody of and to care for their children. They may not be deprived of their parental rights without procedural due process of law. They must have adequate notice that the state proposes to remove the children, and an opportunity to prove their fitness as parents at a hearing. *Stanley* v. *Illinois*, 405 U.S. 645 (1971).

"Defendants' justification of § 7 are without merit. First, defendant Carey alleges that although the child is deemed abandoned, the parents of a child who survives an abortion may petition for restoration of parental rights in Juvenile Court under Ill. Rev. Stat., ch. 37, § 705-8(3). Assuming that parents of the child could undo the abandonment, a post-termination hearing still does not comply with the requirements of the due process clause. In *Stanley*, the Court dismissed a similar argument in the context of a statute terminating unmarried fathers' parental rights after the death of the mother without a prior hearing.

> 'We reject any suggestion that we need not consider the propriety of the dependency proceeding that separated the Stanleys because Stanley might be able to regain custody of his children as guardian or through adoption proceedings. This Court has not, however, embraced the general proposition that a wrong may be done if it can be undone.' *Id.* at 648.

"Second, defendant Carey suggets that the state's responsibility to provide for the child's welfare is a legitimate reason for delaying the hearing until after parental rights are terminated. It is true that the state may terminate rights without prior procedural due process in 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' *Boddie* v. *Connecticut*, 401 U.S. 371, 380 (1971). The survival of a child after an abortion may be unexpected, but it is not an extraordinary situation that excuses the normal process safeguards. Other statutory duties adequately preserve the infant's welfare. The physician has an immediate duty to take measures to protect the life of the infant under § 6(1). Parents who do not want to keep the child may voluntarily give up the child for adoption, and this decision is permanent three days after the child is born. Ill. Rev. Stat., ch. 4, § 9.1-9 (1975). The state may bring proceedings against parents who neglect their children. The automatic termination of parental rights is too harsh and is not needed to insure that a child who survives an abortion is given proper care.

"Dr. Diamond contends that § 7 does not terminate parental rights without due process of law because § 8, which provides that a woman seeking an abortion after viability must be informed of § 7, gives her adequate notice. Dr. Diamond reasons that since the woman who wishes to retain parental rights can forego the abortion, she receives notice satisfying the constitutional requirement. This argument is incorrect for two reasons. First, § 8 provides for notice only after viability and § 7 terminates parental rights in abortions before viability. The woman who is subject to the deprivation therefore would not receive notice of it. Second, even if § 8 required notice of termination of parental rights to all women seeking abortions, that notice would only satisfy the first requisite of procedural due process. The parents would still need an opportunity to contest the termination by proving that they were fit.

"Section 7 violates the due process clause of the Fourteenth Amendment and must be stricken. Section 8 is illogical because it requires that a woman be informed of information which could not possibly apply to her. And since it incorporates a constitutionally infirm provision, it, too, must be stricken." (Emphasis supplied). *Wynn, supra*, at 1322-1324.

Appellants, in arguing the merits, inexcusably ignore the clear state of the record. Appellees in their Affidavits positively assert the real, experienced and actual "increased risks of mortality and morbidity" to and the real and actual "jeopard(y) (of) the health, interests and safety" of their patients, by reason of the challenged sections' operation. Appellants' affiant, a physician who has no actual experience with abortion patients, avers that the reaction of patients treated pursuant to the challenged sections "cannot be generalized or predicted" and "may" have certain effects.

Although the constitutionality of § 188.040 of Missouri Revised Statutes is not directly an issue on appeal in this cause, it is imperative to examine the same on its merits in order to determine the validity of related § 188.045.

Several recent non-abortion related decisions by this Honorable Court and by other federal appellate courts strongly support the need to examine simultaneously the merits of § 188.040 here.

> "As a vendor with standing to challenge the lawfulness of §§241 and 245, appellant Whitener is entitled to assert those concomitant rights of third parties that would be 'diluted or adversely affected' should her constitutional challenge fail and the statutes remain in force. . . . Accordingly, vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates for the rights of third parties who seek access to their market or function.
>
> . . .
>
> "Indeed, the jus tertii question raised here is answered by our disposition of a like argument in Eisenstadt v. Baird, supra. There, as here, a state statute imposed legal duties and disabilities upon the claimant, who was convicted of distributing a package of contraceptive foam to a third

> party. Since the statute was directed at Baird and penalized his conduct, the Court did not hesitate—again as here—to conclude that the 'case or controversy' requirement of Art. III was satisfied. 405 U.S., at 443. In considering Baird's constitutional objections, the Court fully recognized his standing to defend the privacy interests of third parties. Deemed crucial to the decision to permit jus tertii standing was the recognition of 'the impact of the litigation on the third-party interests.' Id., at 445." *Craig v. Boren*, 429 U.S. 190, 195-196 (1976).

More recently, this Honorable Court held in a contraceptive case,

> "Therefore, PPA is among the 'vendors and those in like position [who] have been uniformly permitted to resist efforts at restricting their operations by acting as advocates for the rights of third parties who seek access to their market or function.' Id., at 195. See also Eisenstadt v. Baird, 405 U.S. 438 (1972); Sullivan v. Little Hunting Park, 396 U.S. 229 (1969); Barrows v. Jackson, 346 U.S. 249 (1953). As such, PPA 'is entitled to assert those concomitant rights of third parties that would be "diluted or adversely affected" should [its] constitutional challenge fail.' " Craig v. Boren, supra, at 195, quoting Griswold v. Connecticut, 381 U.S. 479 (1965).[4]
>
> > "4. Indeed, the case for the vendors standing to assert the rights of potential purchasers of his product is even more compelling here than in Craig, because the rights involved fall within the sensitive area of personal privacy. In such a case potential purchasers 'may be chilled from . . . assertion [of their own rights] by a desire to protect the very privacy [they seek to vindicate] from the publicity of a court suit.' Singleton v. Wulff, 428 U.S. 106, 117 (1976)."

Carey v. *Population Services International*, 431 U.S. 678, 684.

Physician-appellants in a commercial sense are, indeed, vendors of abortion services.

The Eighth Circuit has also recognized the governing principles in allowing standing in analogous situations. See: *Middlewest Motor Freight Bureau* v. *United States of America*, 525 F.2d 681, 683 (8th Cir. 1975); and *Regents of the University of Minnesota* v. *The National Collegiate Athletic Association*, 560 F.2d 352, 363 (8th Cir. 1977).

The District Court attempted to view physician-appellees' standing as to §188.040 in a vacuum, without regard to or consideration of their recognized and admitted standing as to §188.045. Furthermore, the District Court attempted to view the constitutionality of §188.045 also in a vacuum, without regard to or consideration of the substantive provisions of §188.040. The District Court held that these two separately numbered statutes each stood alone and separately for purposes of their legal significance. This myopic view was specifically rejected by this Honorable Court in *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), and *Craig, supra*. In each of those cases, the plaintiffs were permitted to raise the constitutional rights of third parties under related statutes, separately numbered from the statutes under which plaintiffs were threatened with or actually convicted.

In *Eisenstadt, supra*, William Baird was convicted of Massachusetts General Law Ann., Chapter 272, §21, for lecturing on contraception and distributing a contraceptive vaginal foam, although he was not a physician. He was permitted to challenge Massachusetts General Law Ann., Chapter 272, §21A, which unconstitutionally distinguished between married and unmarried persons in the area of contraception. In regard to standing, this Honorable Court noted,

> "In any event, more important than the nature of the relationship between the litigant and those whose rights he seeks to assert is the impact of the litigation on the third-party interests." 405 U.S. at 445.

Both the relationship and the impact are more critical in this cause than they were in *Eisenstadt, supra*. This Honorable Court referred to the related sections as a single "statutory scheme". 405 U.S. at 442.

In *Craig, supra*, Carolyn Whitener was threatened with conviction under Oklahoma Statutes, Title 37, §241, for the sale of liquor to a minor but was held to have standing to challenge as well Oklahoma Statutes, Title 37, §245, defining male minors as under age 21 and female minors as under age 18. This Honorable Court, in its analysis, referred to "(t)he interaction of two sections of an Oklahoma statute". 429 U.S. at 191.

The District Court cited no case in which any other court has dissected related legislation in such a manner, so as to exclude an immediately preceding, consecutively numbered and simultaneously enacted section without which the subsequent section is meaningless and unenforceable.

The Eighth Circuit has repeatedly recognized that,

> "In construing the statute, we adhere to the basic canon of construction observed in Richards v. United States:
>
> > 'We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, "we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy".' 369 U.S. 1, 11, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962).

And as stated in 2 Sutherland, Statutory Construction § 2802, at 215 (3d ed. 1943), '[t]he statute should be

construed according to its subject matter and the purposes for which it was enacted.' Over a century ago, Lord Campbell noted, '[i]t is the duty of the Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the *whole scope* of the statute to be construed.' " *The State Highway Commission of Missouri* v. *Volpe*, 479 F.2d 1099, 1111 (8th Cir. 1973). See, also, *Burrow* v. *Finch*, 431 F.2d 485 (5th Cir. 1970).

Physicians have recently been held to have standing to defend the privacy rights of their patients by challenging a Conflict of Interest Law. *Falcon* v. *Alaska Public Offices Commission*, 570 P.2d 469, 475 (Alaska 1977).

The Eighth Circuit in its opinion below unequivocably stated the absolute necessity of examining § 188.040 to determine, in part, the validity of § 188.045 before it.

> "The legitimate state interest at stake here is protecting the mother by requiring an informed consent to the abortion decision. The Court in *Danforth* held that Mo. Ann.Stat. § 188.020(2) (Vernon 1978),[5] Missouri's informed consent provision, was not 'in itself an unconstitutional requirement. The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences.' *Planned Parenthood* v. *Danforth, supra*, 428 U.S. at 67, 96 S.Ct. at 2840. But the Supreme Court did not hold that a state may require physicians to provide to each patient any and all information required by the state, *regardless of its legality, truth, constitutionality or medical advisability*. [W]e are content to accept, as the meaning [of informed consent], the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning that this might well confine the attending physician in an undesired and

uncomfortable straitjacket in the practice of his profession. *Planned Parenthood* v. *Danforth, supra*, 428 U.S. at 67 n. 8, 96 S.Ct. at 2840. Section 188.045 is not sufficiently narrowly drawn to express only the legitimate state interests at stake. *Roe* v. *Wade, supra*, 410 U.S. at 155, 93 S.Ct. at 728.

The information that section 188.045 requires the physician to relate to his patient prior to an abortion operation would most certainly put the physician in a straitjacket. It first requires the physician to warn his patient of consequences that should not occur, as the Missouri Act was written to prevent just such an event. The statutes provide that no abortion may be performed—unless it is to preserve the life or the health of the mother—without the physician first certifying that the fetus is not viable. Section 188.040's provision for termination of parental rights only occurs if a live born infant results from an attempted abortion which was not performed to save the life or health of the mother. Thus, the warning, that if a live born infant results parental rights will be terminated, is for all practical purposes meaningless. By definition, this should not result.

Secondly, although requiring the physician to tell his patient what will be done to accomplish the abortion and what the consequences will be assists the patient in being able to give an informed consent, *Planned Parenthood* v. *Danforth, supra*, 428 U.S. at 66-67, 96 S.Ct. 2831, the requirement that the physician tell his patient of section 188.040 is not reasonably related to the purpose of informed consent. Initially, section 188.045 makes no distinction between trimesters and thus is overbroad. Then the statute which section 188.045 requires the physician to relate to his patient is patently a denial of procedural due process, and further, there is no record of an unsuccessful abortion performed during the first 12 weeks of gestation

resulting in a live born infant. The result of a physician's warning would be to inject into the decision-making process between physician and patient a factor which is irrelevant and extraneous to the medical services being rendered. Section 188.045's imposition upon the physician to inform his patient of section 188.040 is a violation of the equal protection clause of the Fourteenth Amendment inasmuch as it singles out the abortion operation for the imposition of this straitjacket requirement. It is a violation of the due process clause because of the invasion into the delicate and private physician-patient relationship. Requiring the physician to relate section 188.040 interferes with the woman's right to consult with her physician concerning her decision of abortion without undue restriction by the state. *See Wynn* v. *Scott, supra,* 449 F.Supp. at 1316-17. Thus this court finds section 188.045 to be unconstitutional." 584 F.Supp. at 251-252.

CONCLUSION

Appellants' argument suggests a situation totally unique in American jurisprudence. Physician-appellees are mandated by law, under criminal sanctions of imprisonment, fine or both, for violation, to speak certain prescribed words to their patients; yet they may not inquire into the substance and validity of the words they must speak. It may well be surmised that under the District Court's reasoning, pregnant patients desiring abortions would also lack the requisite standing and that only women who have experienced a live birth as a consequence of an abortion would have the necessary standing. This, despite the fact that the uncontradicted record reveals that this statute, in its present posture and application, creates a present and recurring danger and threat to the health of abortion patients. To consider the merits of §188.045 without a consideration of the merits of

§188.045 would be an anomaly and an aberration of the law and of due process.

Respectfully submitted,

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Certificate of Service

I hereby certify that true and correct copies have been mailed by first class postage with postage prepaid, all pursuant to Supreme Court Rule No. 33, to Mr. Michael L. Boicourt, Assistant Attorney General, Supreme Court Building, Jefferson City, Missouri 65101, Attorney for Appellants.

. . . . . .

Frank Susman

MOTION FILED
FEB 10 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78- 1102

JOHN D. ASHCROFT, Attorney General
of the State of Missouri
Appellant

vs.

MICHAEL FREIMAN, M.D.
Appellee

Appeal from the United States Court
of Appeals for the Eighth Circuit

MOTION TO APPOINT COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE

Alan Ernest
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Counsel for Movant

MOTION FOR APPOINTMENT OF ALAN ERNEST AS COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE

The Court is moved to appoint Alan Ernest as counsel, or guardian ad litem, to represent the children unborn and born alive in this case.

Alan Ernest is a lawyer in the District of Columbia, and a member of the bar of this Court. His interest is to defend the constitutional rights of children unborn and born alive.

Counsel will present new evidence, unquestionably unparalleled in the legal history of this nation, not presented by the parties. This new evidence is outlined in the attached brief in support of this motion.

The new evidence shows that many of the killings that Roe v Wade asserted to legalize were murder in 1868 and punishable by the death sentence. Obviously, a child whose life was protected by the murder laws in 1868 is a person within the language and meaning of the Fourteenth Amendment. Absent a constitutional amendment, the killings are still murder. Justices who presumed to permit these killings may be subject to the death penalty in very many states.

The counsel also adopts by reference the evidence submitted in the amicus brief by the LEGAL DEFENSE FUND FOR UNBORN CHILDREN. That evidence shows Roe v Wade to be based on false evidence and millions of lives to be unconstitutionally exterminated.

WHEREFORE, the Court is moved to appoint Alan Ernest to be counsel to defend the children unborn and born alive.

Alan Ernest
Counsel

BRIEF

SUMMARY OF ARGUMENT

MANY ROE v WADE KILLINGS ARE MURDER

The evidence will show that many of the killings permitted by Roe v Wade, 410 US 113(1973) were murder in 1868. Since the killings were murder in 1868, then absent a constitutional amendment, the killings are still murder, and Roe v Wade is no law at all.

ARGUMENT

1. Introduction to Evidence

The evidence presented herein will show that, at the time the Fourteenth Amendment was adopted in 1868, the unlawful killing, with malice aforethought, of a child born alive was murder. Killings of children born alive were not treated as a special category, as was abortion.

It is thus absolutely indispensable to examine what "born alive" meant in 1868. It is obvious that, if the life of a child born alive was protected by the murder laws in 1868, then it is a person within the language and meaning of the Fourteenth Amendment.

The evidence shows that in 1868, born alive did not mean natural birth after nine full months gestation; nor did it mean birth after viability ("that is, potentially able to live outside the mother's womb, albeit with artificial aid." Roe v Wade, 35 L Ed 2d at 181). If abortion resulted in a live but unviable child that died as a consequence of its not being able to survive outside the womb, it was murder and punishable by the death penality.

The evidence shows that the hysterotomy is a common method of performing abortions under Roe v Wade. This is essentially a Caesarean, in which a live but unviable child is removed from the womb and left to die. The legal authorities show that in 1868, such a killing was murder and punishable by the death sentence.

In summary, what was murder in 1868, can not now be decreed a constitutional right. Without an amendment to the Constitution, the killings must still be murder, and the Justices who permitted these killings may be guilty of mass murder in the first degree. This is still punishable by the death sentence in many states.

2. The English Law

The English law, as reflected in the writings of Coke(3 Inst. 50), Hawkins(1 Hawkins Bk.1, ch. 16) and Blackstone (4 Bl. Com. 198) defined the felonious killing of a child "born alive" as murder, even if the child received the fatal wound in the womb.

These authorities were followed by the English courts in permitting prosecutions of the killing of children born alive as murder. Rex v Senior, 1 Moody CC 346(1832); Reg. v Trilloe, 174 Eng. Rep. 674(1842); Reg. v West, 2 C & K 784(1848).

Most critically, in the English law, a child did not have to be viable to be born alive. In 1848 the leading case of Regina v West, 2 C & K 784, was decided. The indictment for murder alleged that the defendant had inserted a "certain pin" "upward into the womb" of a pregnant woman for the purpose of producing the abortion of a "quick" child; and that this resulted in the child being "prematurely born and brought forth alive from and out of the womb." Id., 784-85. The child died shortly thereafter. A

"medical witness" had testified that:

"(I)t was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any considerable length of time separated from the womb of the mother. It was incapable of maintaining a separate and independent existence." Id., at 786.

The judge, relying on Coke and Blackstone, instructed the jury:

"The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery of the witness Hensen, by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died. .... I am of the opinion (and I direct you in point of law), that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder." Id., at 788.

The case of Regina v West, supra, was presented by the leading English writers as the correct statement of the law of murder. See, e.g., 2 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783(Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-72 (4th ed. 1865); A.S. Taylor, A Manual of Medical Jurisprudence 516(Penrose Am. ed. 6th ed 1866). Consequently, the evidence shows that in the English common law, the abortion of a quick but unviable child that resulted in the child being born alive so prematurely that its death was caused by its inability to survive outside the womb, was murder.

3. The American Law Of Murder In 1868

The English common law of murder of children born alive is significant since American courts used the English common law to construe their murder statutes. Clarke v State, 117 Ala 1(1898); Hamilton v United States, 26 App. D.C. 382(1905).

American courts cited Coke, Hawkins, Blackstone, and the English court decisions, as authoritative precedents on the law of homicide of children born alive. See, e.g., Clarke v State, 117 Ala. 1(1898); State v Winthrop, 43 Iowa 519 (1876). By 1868, leading American legal authorities had specifically cited Regina v West, supra, as the correct law of murder of a child born alive. (As already noted, that case held that if a criminal abortion resulted in the premature delivery of a quick but unviable child that died after delivery as a consequence of its being so prematurely delivered that it could not survive outside the womb, it was murder.) See, e.g., F. Wharton, A Treatise on the Law Homicide in the United States 96-97(1855). By 1868, this appears to be the uncontradicted view.

Consequently, the evidence shows that the life of a quick but unviable child born alive was protected by the murder laws in 1868.

4. The Law Of Murder In 1868 And The Fourteenth Amendment

Since the evidence shows that the life of a quick but unviable child was protected by the murder laws in 1868, the evidence likewise establishes that the child so born alive is a person within the language and meaning of the Fourteenth Amendment.

By seizing upon viability, Roe v Wade permits the killings of quick but unviable children born alive. The Supreme Court presumed to decree the killing of these children to be a constitutional

right without any examination whatsoever to see if these children were persons within the language and meaning of the Fourteenth Amendment. It is a naked decree without any investigation into the law of murder of children born alive.

This raises the question,- Does the Supreme Court have the Hitler-like power to decree murder to be a constitutional right? If invalids were protected by the murder laws in 1868, can the Supreme Court, without evidence or investigation, decree a constitutional right to kill invalids? If Jews were protected by the murder laws in 1868, can the Supreme Court decree, without evidence or investigation, a constitutional right to kill Jews? If newspaper editors were protected by the murder laws in 1868, can the Supreme Court, without evidence or investigation, decree a constitutional right to kill newspaper editors?

No doubt the Supreme Court bears the burden of proving, by evidence so conclusive that it will not admit of a rational doubt, that it possesses the power to decree murder to be a constitutional right.

5. The Hysterotomy Abortion Under Roe v Wade

A common way to perform abortions under Roe v Wade is by hysterotomy. See, e.g., Commonwealth v. Edelin, 359 NE 2d 4 (Mass. 1976). A hysterotomy is essentially a Caesarean, in which a live but unviable child is removed from the womb and left to die. See, 1 Hearings Before The Subcommittee On Civil And Constitutional Rights Of The Committee Of The Judiciary, House of Representatives On Proposed Constitutional Amendments on Abortion 397(GPO 1976).

As established by medical testimony during the 1976 House Abortion Hearings, "With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry. . . .Almost all are born alive." Id., at 397.

Consequently, by definition, in 1868, these hysterotomy abortions could have been prosecuted as murder.

6. ROE v WADE AND MISTAKE OF LAW

The Supreme Court itself has recognized that constitutional provisions against ex post facto laws do not apply to judicial decisions. Ross v Oregon, 227 US 150(1913). Consequently, if Roe v Wade is a mistake of law, then mass murder is being perpetrated in America. The Roe v Wade hysterotomy killings, by definition under the common law and thus constitutional law, violate the positive criminal murder statutes throughout the United States.

The killings of children born alive have been prosecuted as murder in the first degree, Comm. v Harmon, 4 Barr. 269(Pa 1846)(child thrown in creek); or murder in the second degree, Clarke v State, 117 Ala. 1 (1898)(wife beaten, child die from injuries) or manslaughter, People v Chavez, 77 Cal. App. 2d 621(1947)(child neglected),- according to the facts of the particular case, as in any other homicide.

In connection with these judicial killings, it is relevant to note that the Supreme Court decreed murder to be a constitutional right without any examination whatsoever of the law of murder of children born alive. And as Abraham Lincoln noted, "(I)t is an established maxim in morals that he who makes an assertion without knowing whether it is true or false, is guilty of falsehood; and the accidental truth of the assertion, does not justify or excuse him." 1 The Collected Works of Abraham Lincoln 384 (Basler ed. 1953). Since Lincoln's day, this "maxim in morals" has also been a textbook definition of perjury. See, e.g., 3 Wharton's Criminal Law and Procedure, Sec. 1308, p. 673(12th ed 1957).

Consequently, rational people are entitled to believe, and a jury may be permitted to find, that the process by which the Supreme Court decreed

murder to be a constitutional right is perjury or criminal fraud. It seems reasonable that such judicial killings, after such prolonged deliberation and adherence, could be prosecuted as murder in the first degree. Many states still punish mass murder in the first degree with the death sentence.

It may be that the judges responsible for the judicial killings did not believe that they were breaking the law. But as Mr. Justice Oliver Wendell Holmes once wrote, "Ignorance of the law is no excuse for breaking it." "It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but.. ...the lawmaker has determined to make men know and obey." Holmes, The Common Law 41(Howe ed 1963).

It now full well appears that the Justices of the Supreme Court of the United States have presumed to decree murder to be a constitutional right, without any evidence or examination whatsoever, with the death penalty the possible consequence of their decision being a mistake of law.

It now appears that, unless the Supreme Court can prove by evidence, beyond a doubt based on reason, that it has the Hitler-like power to decree mass murder to be a constitutional right, then Roe v Wade is just such a mistake of law.

CONCLUSION

Is government of laws founded upon evidence, or the mere naked decrees of men holding office for life?

The evidence proffered herein would appear sufficient to permit reasonable people to conclude beyond a reasonable doubt that the Supreme Court of the United States has committed mass murder in the first degree. The evidence would appear sufficient for reasonable people to conclude that, upon a scale never seen before in the peacetime history

of the world, "The dagger of the assassin was concealed beneath the robe of the jurist." The Justice Case, 3 Trials of War Criminals Before The Nuernberg Military Tribunals 985(GPO 1951).

If the United States were being ruled over by a Tribunal of Murderers, holding office for life, nakedly decreeing mass murder to be a constitutional right, in open defiance of the evidence, and presuming to be blindly obeyed by all courts, executives, legislatures, and people whatever without question, regardless of the evidence, then surely it would be the most astounding event in the legal history of the human race.

Alan Ernest
Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1102

JOHN D. ASHCROFT, Attorney General
of the State of Missouri

Appellant

vs.

MICHAEL FREIMAN, M.D.

Appellee

Appeal from the United States Court
of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE A BRIEF WITH BRIEF AS AMICUS CURIAE FOR THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN IN SUPPORT OF THE APPELLANT

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE ON BEHALF OF THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN IN SUPPORT OF THE APPELLANT

The Legal Defense Fund For Unborn Children is an organization whose interest is to protect the constitutional rights of unborn children.

The amicus presents legal matter to the Court which is not presented by the parties.

The amicus tenders evidence to show that Roe v Wade, 410 US 113 (1973) is based on false evidence and millions of lives have been unconstitutionally exterminated. Of course, this requires the overruling of that case.

If Roe v Wade were overruled, it would be dispositive of this case.

The amicus also adopts by reference the new evidence presented in the brief in support of the Motion To Appoint Counsel For Children Unborn And Born Alive. That evidence shows many Roe v Wade killings to be murder in the first degree.

WHEREFORE, the Court is moved to grant this motion for leave to file this amicus brief.

Alan Ernest
Counsel for Amicus

BRIEF

For the 29th time, the Supreme Court is petitioned to overrule Roe v Wade, 410 US 113(1973) on the grounds that it is based on false evidence and millions of lives have been unconstitutionally exterminated.

Can it be pretended that it is any longer the government of the United States,- any government of Constitution and laws,- wherein a Tribunal holding office for life, and asserting to be the ultimate arbiter, conducts proceedings to condemn millions of victims to death; fabricates evidence to make the exterminations appear legal; refuses to allow its evidence to be cross-examined; refuses to appoint counsel to defend the victims; refuses to allow evidence to be presented on behalf of the victims, even evidence showing that the victims are being unconstitutionally exterminated by false evidence?

SUMMARY OF ARGUMENT

1. The Supreme Court is petitioned to overrule Roe v Wade, 410 US 113(1973) on the grounds that it is based on false evidence and millions of lives have been unconstitutionally exterminated. See PART I, infra pages 2-6.

2. It is also alleged that, independent of the evidence in Roe v Wade, the procedures used by the Supreme Court to effect the Roe v Wade killings so palpably violate due process of law as to leave no question that the exterminations are unconstitutional. See PART II, infra pages 6-9.

3. It is further alleged that the Roe v Wade killings violate federal criminal statutes. The Supreme Court of the United States is charged with criminal falsehood and criminal extermination. See PART III, infra pages 9-11.

ARGUMENT

PART I

ROE v WADE IS BASED ON FALSE EVIDENCE

It is alleged that Roe v Wade, 410 US 113(1973) is based on false evidence and millions of lives have been unconstitutionally exterminated: Roe v Wade must be overruled. An EXHIBIT A, outlined below, has been repeatedly submitted to the Court to prove this charge.

EXHIBIT A was succinctly outlined in counsel's 16th petition to overrule Roe v Wade (Unborn Child Roe v John J. Sirica, Judge, United States District Court for the District of Columbia, (78)A-215):

"1. even the Supreme Court admitted in Roe v. Wade that if the unborn were 'a "person" within the language and meaning of the Fourteenth Amendment' then the case for abortion for convenience 'of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment,' and

"2. the express, universal terms of the Fourteenth Amendment ('nor shall any State deprive any person of life . . . without due process of law') on their face, protect the lives of the unborn, as everyone else, and

"3. the holdings of Chief Justice John Marshall (that can be traced through the Constitution, The Federalist Papers, and The Federal Convention of 1787) show that the Supreme Court had no lawful authority to construe an exception to express, universal terms (such as 'any person') unless the Court could prove the exception to the express, universal terms beyond a reasonable doubt, and show that 'had this particular case been suggested' to the framers the 'language would have been so varied, as to exclude it,' and

"4. the Supreme Court presented false evidence to support its conclusion in Roe v Wade that 'the word "person," as used in the Fourteenth Amendment, does not include the unborn,' and but for the false evidence, there is not even a credible foundation, much less a compelling one, for denying the protection of the express, universal terms 'any person' to the lives of the unborn, and

---

Summary of False Evidence

In introduction, at the time the Fourteenth Amendment was adopted in 1868, most states had already enacted positive statutes that made abortion a crime unless it were necessary to save the life of the mother. Within a few years, these criminal abortion statutes were virtually universal.

Consequently, any theory of a constitutional right to abortion on demand faced an impossible contradiction: How is it possible that the people who adopted the Fourteenth Amendment had enacted positive criminal statutes to protect unborn life, and at the same time, without a single word of explanation, intended to imply an exception to the express, universal terms that not "any person" can be deprived of life without due process of law, and to create a constitutional right to abortion on demand?

To resolve that fatal contradiction, the Court asserted the hypothesis that when the criminal abortion laws were first enacted, the laws were not intended to protect unborn life, but rather were only intended to protect the mother. This hypothesis was falsely fabricated and used as follows:

(A.) The Supreme Court first asserted, "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." Roe v Wade, 35 L Ed 2d at 174. This was asserted as fact.

The only authority cited by the Supreme Court to prove this assertion of fact was a 20th century medical history book, Haagensen and Lloyd, A Hundred

Years of Medicine 19(1943). But this book merely described the hazards of major surgery in general prior to Lister's discovery of antiseptics. The reference did not even mention the abortion operation.

However, the 19th century obstetric authorities throughout the Western World prove the Court's assertion of fact to be false. These 19th century obstetric authorities, based on their own experience in performing abortions, and from hundreds of cases reported from around the world, declared in their obstetric textbooks that the abortion operation, the operation of artificially evacuating the fetus from the womb, was "perfectly safe" to the mother, 2 T. Denman, M.D., An Introduction to the Practice of Midwifery 96(1802)(English physician); or "experience has proved that the dangers of the operation are reduced to a small matter," A.L.M. Velpeau, M.D., A Complete Treatise on Midwifery 530(4th American ed. 1852)(French physician); or "to the mother there is very little danger." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 293(1864)(American physician). In short, the obstetric authorities prove the Supreme Court's assertion of fact to be false.

The Supreme Court never revealed the "hazardous" abortion "procedure" to which it was referring. Actually, the 19th century physicians used the ancient method: "the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus" to "come on," which resulted in the expulsion of the fetus from the womb. 2 Denman, supra, 99. One 19th century physician traced this operation back almost 2000 years.

(B.) The Supreme Court next asserted, "Abortion mortality was high." Roe v Wade, 35 L Ed 2d at 174. This is asserted as fact.

The Supreme Court asserted "Abortion mortality was high" without any authority to support it. It is a naked assertion. The 19th century obstetric authorities also prove this assertion of fact to be false.

(C.) Upon the two false assertions of fact, the Supreme Court infers that "a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." Roe v Wade, 35 L Ed 2d at 174.

(D.) From the inference that the criminal abortion laws were not intended to protect the unborn, the Court further inferred that, likewise, the framers of the Fourteenth Amendment did not intend it to protect the lives of the unborn, "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v Wade, 35 L Ed 2d at 180. This conclusion rests entirely on inference.

This pyramid of inference is shown to rest on assertions of fact that are false.

Moreover, as independent corroboration of the purpose of the criminal abortion statutes to protect the unborn, 19th century authorities in criminal law, e.g., 2 Archbold, Archbold's Criminal Procedure, Pleading and Evidence 295(6th ed 1853); medical jurisprudence, e.g., F. Wharton and M. Stille, M.D., A Treatise on Medical Jurisprudence 339, 927(2d ed. 1860); medicine, e.g., 13 Transactions of the American Medical Association 56-58 (1860); as well as state supreme courts, e.g., State v Moore, 25 Iowa 128, 135-136(1868), did expressly affirm that these criminal abortion statutes were intended to protect the lives of the unborn.

Consequently, not only is the Supreme Court's inference about the purpose of the 19th century abortion laws shown to rest on false assertions of fact, but there is no other evidence to come to the rescue and save the Court's conclusion. The 19th century authorities prove the very contrary.

In Summary, the Supreme Court bore the burden of proving beyond a reasonable doubt that the express, universal terms of the Fourteenth Amendment,

"any person," did not include the unborn. Yet, the Supreme Court did not cite one 19th century authority that expressly affirmed that the unborn were not persons within the language and meaning of the Fourteenth Amendment, or that there was a constitutional right to abortion on demand; and the Court's conclusion that the 19th century abortion laws were not intended to protect the unborn is shown to rest on false evidence. To the contrary, the 19th century authorities demonstrate that the people who adopted the Fourteenth Amendment not only intended to protect the lives of the unborn, but had already enacted criminal abortion statutes to do so in fact.

"5. the truthful history corroborates that the express, universal terms 'any person' include the unborn, as they do all categories of persons, and more certainly than many groups. The Supreme Court included corporations and aliens as a 'person' within the language and meaning of the Fourteenth Amendment merely on the strength of the express, universal terms 'any person,' without any independent corroborating evidence whatsoever. (The unborn being the only persons ever excluded from the terms 'any person')

"In short, EXHIBIT A shows that the Supreme Court violated the very letter of the Constitution as well as its spirit, and condemned millions of victims to death whom the Constitution endeavors to preserve. . . . . (A)nd there appears to be no defense that will not amount to a claim that the Supreme Court is above the law."

PART II
THE COURT'S PROCEDURES ARE UNCONSTITUTIONAL

Completely independent of the Court's evidence, supra PART I, it is also alleged that the procedures used by the Supreme Court to effect the Roe v Wade killings are in such manifest conflict with due

process of law as to leave no doubt that the killings are unconstitutional.

As counsel's 17th petition to overrule Roe v Wade pointed out (Gaetano v. Earl Silbert, United States Attorney for the District of Columbia, No.78-427):

"The evidence in Roe v Wade aside, the procedures used to effect the Roe v Wade killings alone condemn the killings as illegal. The Nuremberg court, in outlining the case against the Nazi judicial system, noted that many victims were executed after trials which 'did not approach even a semblance of fair trial':

'In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them. . . . They were ... denied the right of counsel of their own choice, and occasionally denied the aid of any counsel.' [citation omitted]

" The U.S. Supreme Court has, in broad form, used these very procedures to effect the Roe v Wade killings. For example, in Roe v Wade, the Court used evidence found by itself, which the parties had not cross examined in a judicial proceeding. The Attorney General of Georgia, a party, requested leave to cross examine the Supreme Court's evidence:

'The Court has taken judicial notice of innumerable facts . . . some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter evidence since they form the foundation of the Court's opinion.' Petition for Rehearing at 4, Doe v Bolton, 35 L Ed 2d 201(1973).

"But the Supreme Court would not allow its evidence to be cross examined by the party. Pet. Rehearing denied, Doe v Bolton, 35 L Ed 2d 694(1973).

"And year after year, the Supreme Court has denied these applications to present evidence on behalf of the unborn victims to show that the unborn are persons whose lives are protected by the U.S. Constitution. This new evidence shows the Supreme Court's evidence to be false; and the Supreme Court will not allow the evidence to be presented.

[For example, in Planned Parenthood of Central Missouri v Danforth, 49 L Ed 2d 788(1976)(the first major abortion case after Roe v Wade) eight lawyers, as counsel or amici, submitted an amicus curiae brief, outlining the evidence in PART I, supra, and alleging that "newly discovered evidence indicates that Roe v Wade rests upon factual errors that require the overruling of that case."

Since the purpose of amicus briefs is to present legal matter to the Court, not presented by the parties, so that the Court will not go wrong on vital national affairs, the Court seldom rejects amicus briefs. Stern and Gressman, Supreme Court Practice 481-82(4th ed 1969). The landmark constitutional decision which applied the Fourth Amendment exclusionary rule to the States was predicated upon argument by amicus curiae, not the parties. Mapp v Ohio, 367 US 643, 646 n.3(1961). And in the Missouri abortion case it was only the amicus brief that presented the newly discovered evidence showing Roe v Wade to be based on false evidence.

But the Supreme Court would not allow this amicus brief to be filed. Motion to file by D.C. Right to Life Committee, et al., denied 46 L Ed 2d 633(1976). After refusing to allow this "newly discovered evidence," showing Roe v Wade to be based on false evidence, to be presented on behalf of the unborn, the Court proceeded to nullify parts of the Missouri abortion statute, and effectively extended the killings in the name of Roe v Wade.]

"And no abortion case before the Court appears to have had counsel to especially represent the unborn and defend their constitutional right to life.

[Moreover, the Supreme Court has repeatedly refused

to allow counsel to represent the unborn in its judicial proceedings, and to defend the unborn's constitutionally protected right to life.

In Doe v Bolton, the Attorney General of Georgia requested the Court to allow "representation of a guardian ad litem for that fetal entity and for its right to develop to birth." Petition for Rehearing supra, at 5. But the Court denied the request.

In Beal v Franklin, No. 77-891, the Court heard argument after refusing to allow counsel to represent the unborn and present the evidence, supra PART I, to show that the victims were being unconstitutionally exterminated by false evidence. 57LEd 2d 1131.

In Anders v Floyd, No. 77-1255, the Supreme Court again refused to allow counsel to defend the unborn and present the evidence, supra PART I.]

"In summary, without counsel representing the victims, it appears that the Supreme Court itself produced evidence to condemn the victims; denied permission to cross examine its evidence; and denied requests to present evidence on behalf of the victims, even evidence showing the Court's evidence to be false. Exterminations pursuant to these procedures cannot be pretended to be lawful."

PART III
THE CASE AGAINST THE SUPREME COURT

Counsel's 8th (Gaetano v Louis Oberdorfer, Judge, United States District Court for the District of Columbia, No. 77- 1358) and each subsequent petition, specified the federal criminal statutes believed violated, and charged the Supreme Court with criminal falsehood and criminal extermination.

The Supreme Court has not denied the charges, much less attempted to prove the charges to be false:

"THE CASE AGAINST THE SUPREME COURT

"The evidence appears to support the charge that some Justices of the U.S. Supreme Court have violated federal criminal statutes, such as:

"18 USC 242, Deprivation of rights under color of law,- It is a crime for government officials, acting under pretense of law, to willfully deprive persons of their rights secured by the U.S. Constitution. The documentation in EXHIBIT A, at the very least, permits reasonable people to conclude beyond a reasonable doubt that the unborn are persons whose lives are protected by the U.S. Constitution. The evidence that Justices specifically authorized killings throughout the United States, by a willfully false construction of the Constitution, would certainly permit a jury to conclude beyond a reasonable doubt that Justices, acting under pretense of law, had deprived millions of unborn persons of their right to life protected by the U.S. Constitution.

"22 D.C. Code 201, D.C. abortion statute,- The felony abortion statute only permits abortions in the District of Columbia to preserve the mother's life or health. The evidence that Justices specifically authorized non-therapeutic abortions in violation of the positive criminal statute, by a willfully false construction of the Constitution, would surely permit a jury to find beyond a reasonable doubt that Justices had aided and abetted those killings.

"22 D.C. Code 105 a, Conspiracy,- When Roe v Wade was decided, non-therapeutic abortions were illegal, not just in the District of Columbia, but generally throughout the United States. The evidence that Justices specifically authorized non-therapeutic abortions in violation of the States' positive criminal statutes, by a willfully false construction of the Constitution, would appear to permit a jury to find beyond a reasonable doubt that Justices conspired to effect those killings.

"18 USC 1503, Obstruction of justice,- It is a

crime to endeavor to obstruct or impede the due enforcement of the law of the land, even by conduct that is otherwise legal, if the motive is corrupt or dishonest. The evidence that the Supreme Court has been petitioned year after year to overrule Roe v Wade on the grounds that it is based on false evidence and millions of lives have been illegally exterminated, and year after year the Supreme Court summarily refused to even listen, would appear sufficient to permit a jury to conclude beyond a reasonable doubt that Justices had dishonestly endeavored to obstruct or impede the due enforcement of the law of the land.

"18 USC 1001, False statements,- The evidence that some Justices, within their official jurisdiction, made or adopted false statements in Roe v Wade, and repeated petitions indicated the false statements to be willful and knowing, might be sufficient to permit a jury to conclude beyond a reasonable doubt that some Justices had made false statements within 18 USC 1001.

"18 USC 371, Conspiracy,- It is not only a crime to conspire to commit any criminal offense, but also to conspire to defraud the United States by misrepresentation or the overreaching of those charged with the carrying out of the governmental intention. The evidence already mentioned would appear sufficient to permit a jury to find beyond a reasonable doubt that Justices had not only conspired to commit the above mentioned crimes, but also to defraud the United States.

"18 USC 1621, Perjury,- An oath of office to uphold the Constitution would probably not, under ordinary circumstances, support a charge of perjury. However, Chief Justice John Marshall held that for "judges" to "swear" to discharge their duties "agreeably to the constitution" and then "close their eyes on the constitution" and "condemn to death those victims whom the constitution endeavours to preserve" is worse than "solemn mockery," it is a "crime." Marbury v Madison, 1 Cranch at 179-180.

And failure to deny a charge can be taken as an admission that the charge is true. "Underlying the rule is the assumption that human nature prompts an innocent man to deny false accusations and consequently a failure to deny a particular accusation tends to prove belief in the truth of the accusation." McCormick On Evidence 353(1972). "(T)he Court has consistently recognized that . . . silence in the face of accusation is a relevant fact . . . . . Silence is often evidence of the most persuasive character." Baxter v Palmigiano, 47 L Ed 2d 810,822 (1976). And Socrates cross-examined at his trial over 2000 years ago, "(Y)ou are silent, and have nothing to say. But is this not rather disgraceful, and a very considerable proof of what I was saying"? And again,"I may assume that your silence gives consent." Apolpgy in Plato 41,45(Jowett transl. 1942).

CONCLUSION

Can it be pretended that it is any longer the government of the United States,- any government of Constitution and laws? As noted in the 18th petition to overrule Roe v Wade(Gaetano v U.S. Court of Appeals for the District of Columbia Circuit, No. 78-428):

"Through Roe v Wade, the Supreme Court has asserted a second method for the government to condemn persons to death:

"The first, set out in the Constitution, is by conviction by an impartial jury for violation of express laws enacted by the people and applicable to all in the state; with right to representation by counsel; with right to be acquitted unless found guilty beyond a reasonable doubt; with provision to stop execution if new evidence is discovered.

"The second, set out in Roe v Wade, is for a Tribunal holding office for life(without assistance of counsel to defend the victims)to rule the victims out of the human race as inferiors, in violation of the very letter and spirit of the Constitution, falsifying evidence to make the homicides appear legal, and year after year to repeatedly deny applications showing the exterminations to be illegal.

"In 1975, the Supreme Court of West Germany held that the clause in the German Constitution, 'Everybody has the right to life,' also 'includes unborn human beings,' that 'Abortion is an act of homicide,' and the state has a 'duty' under the Constitution 'to protect unborn life.' . . .It was just about 35 years ago that the German judges decided that certain persons were not protected by their law. And it is now of paramount international importance to determine how it is possible for the high courts of two major democratic nations, construing constitutional phrases that are substantially identical, to reach diametrically opposing conclusions about the legality of millions of premeditated homicides.

"That examination, presented in EXHIBIT A, surely permits reasonable people to conclude beyond a reasonable doubt that the Supreme Court closed its eyes on the Constitution and condemned to death millions of victims whom the Constitution endeavors to preserve; and there appears to be no defense that will not amount to a claim that the Supreme Court is above the law- that as Hitler was to Germany, so the Supreme Court is to America.

"If it be true, as Chief Justice Marshall once held(see Marbury v Madison, 1 Cranch 137, 163, 176, 178) that 'government of laws, and not of men,' founded in a 'written constitution' deriving its just power from the 'supreme' 'authority' of 'the people' is 'the greatest improvement on political institutions,' then the overthrow of that government of laws by lawless federal judges may be the most heinous crime in the history of government."

Wherefore, counsel demands opportunity to cross examine the evidence in Roe v Wade, and to present evidence on behalf of the unborn to establish their constitutionally protected right to life and that the Supreme Court obey the evidence.

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